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United States
1073
Circuit Court of Appeals

For the Ninth Circuit.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Plaintiff in Error,

vs.

ANNA F. FRESCOLN,

Defendant in Error.


Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

Filed

DEC 18 1916

F. D. Monckton,
Clerk.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

JAMES B. HOWE, Esq., Attorney for Defendant
and Plaintiff in Error,

Stuart Building, Seattle, Washington.

H. S. ELLIOTT, Esq., Attorney for Defendant and
Plaintiff in Error,

Electric Building, Seattle, Washington.

THOMAS H. BAIN, Esq., Attorney for Plaintiff and
Defendant in Error,

448 New York Block, Seattle, Washington.

[1*]

*In the Superior Court of the State of Washington,
in and for the County of King.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

THE PUGET SOUND TRACTION, LIGHT &
POWER COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff complains of the defendant and for
cause of action alleges:

I.

That the plaintiff Anna F. Frescoln is the widow
of J. W. Frescoln, deceased; that said plaintiff and
said deceased intermarried on the 18th day of Jan-
uary, 1880.

*Page-number appearing at foot of page of original certified Tran-
script of Record.

II.

That the defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, with its principal place of business in the City of Seattle, King County, Washington, and has been such during all the times referred to in this complaint.

III.

That at all times referred to herein, defendant was the owner of and was operating and maintaining a certain electric street railway line over and on Queen Anne Avenue, a public street within the corporate limits of the City of Seattle, King County, State of Washington, under and by virtue of a certain franchise granted to defendant or its predecessors by the said City of Seattle, and that said electric street railway was a common carrier of passengers for hire.

[2]

IV.

That on or about the 22d day of November, 1913, while said J. W. Frescoln, deceased, was a passenger on one of defendant's passenger cars, then being regularly operated by said defendant company on its said electric street railway line on said Queen Anne Avenue near the Mercer Street crossing, the defendant operated said car in such a careless, reckless and negligent manner that the said J. W. Frescoln, deceased, was, without warning, suddenly and violently thrown from the steps and through the open gates of said car to the paved street, striking upon the left side of his head, receiving a severe cut, bruise and laceration of the head and face, spraining and

wrenching the cords, ligaments and muscles of his neck and body and severely jarring his whole body, rendering him for a time wholly unconscious, whereby he become sick, causing vomiting and was made sore and lame and was confined to his bed a considerable time and suffered great bodily pain, and the said J. W. Frescoln, now deceased, was so crushed, bruised and injured by being so thrown from said car that he died from the effects thereof on the 15th day of September, 1914, in said county; that said fall, injuries and death of said J. W. Frescoln, deceased, were caused wholly by the fault, negligence and carelessness of the defendant, its agents and employees in the management and operation of said car and of said road.

V.

That said J. W. Frescoln, deceased, was at the time of his death at the age of fifty-eight years; was sound and vigorous in body and mind; a kind and affectionate husband; that he left him surviving as his heir, his widow, Anna F. Frescoln, the plaintiff herein, who was at the time of his death entirely dependent upon him for her support and maintenance; that said deceased was at the [3] time of his death a resident of the city of Seattle, Washington, and by profession a minister of the gospel and in good and regular standing in the Puget Sound Conference of the Methodist Episcopal Church, and capable of earning the sum of eighteen hundred dollars per year in the discharge of his duties as such minister. That at the time of his death and for many years prior thereto, he had been and was providing

liberally for the maintenance and support of his family, was a kind and indulgent husband, and by his said death his widow has been deprived of his affection, companionship and support to her damage in the sum of twenty-five thousand (\$25,000) dollars.

WHEREFORE, plaintiff prays for judgment against defendant for the sum of twenty-five thousand (\$25,000) dollars and for costs of this action.

THOS. H. BAIN,
Attorney for Plaintiff.

State of Washington,
County of King,—ss.

Anna F. Frescoln, being first duly sworn, says: That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint, knows the contents thereof and believes the same to be true.

ANNA F. FRESCOLN.

Subscribed and sworn to before me this 15th day of April, A. D. 1915.

THOS. H. BAIN,
Notary Public in and for the State of Washington,
Residing at Seattle. [4]

State of Washington,
County of King,—ss.

Anna F. Frescoln, being first duly sworn, on oath says: That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint, knows the contents thereof and believes the same to be true.

Subscribed and sworn to before me this — day
of April, 1915.

THOS. H. BAIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within Summons and Complaint received
and due service of same acknowledged this — day
of April, 1915.

Attorney for ———.

Filed in clerk's office, May 11, 1915. W. K. Sick-
els, Clerk. By F. W. Smith, Deputy.

[Indorsed]: Complaint. Filed in the U. S. Dis-
trict Court, Western District of Washington, North-
ern Division. June 7, 1915. Frank L. Crosby,
Clerk. By E. M. L., Deputy. [5]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant above named and for an-
swer to the complaint of the plaintiff herein shows:

I.

For answer to the first paragraph of the complaint the defendant admits the same.

II.

For answer to the second paragraph of the complaint the defendant admits the same.

III.

For answer to the third paragraph of the complaint the defendant admits the same.

IV.

For answer to the fourth paragraph of the complaint the defendant admits that on or about the 22d day of November, 1913, J. W. Frescoln, deceased, was a passenger upon one of defendant's cars operated on Queen Anne Avenue near the Mercer Street crossing; but the defendant denies each and every other allegation in said paragraph IV contained.

V.

For answer to the fifth paragraph of the complaint [6] the defendant denies the same.

For a first special and affirmative defense the defendant alleges:

I.

That the injuries, if any, received by said J. W. Frescoln. were caused and contributed to by his own careless and negligent acts.

For a second affirmative defense, and as a plea in bar to the right of the plaintiff to maintain this present action, the defendant shows:

I.

That heretofore, to wit, on the 22d day of January, 1914, J. W. Frescoln commenced an action in the

Superior Court of the State of Washington for King County, against the defendant, which said action was founded upon the same cause of action upon which the present complaint of Anna F. Frescoln is founded.

II.

That thereafter and in due course, the defendant answered the said complaint. and thereafter the said J. W. Frescoln replied to said answer. That a copy of said original complaint, the answer thereto, and the reply are hereunto attached and marked respectively Defendant's Exhibits "A," "B," and "C," and are made a part of this answer as though fully set forth herein.

III.

That said cause was set regularly for trial in said Superior Court of the State of Washington for the 13th day of October, 1914, but that prior to the time of the hearing of said cause, to wit, on the 15th day of September, 1914, J. W. Frescoln [7] died; that thereafter, on, to wit, the 17th day of November, 1914, the plaintiff, Anna F. Frescoln, filed an application with the Superior Court for King County, Washington, that she be allowed to substitute herself in her own right and also herself as the administratrix of said J. W. Frescoln, deceased, and that thereafter on the 27th day of November, 1914, the said Superior Court of the State of Washington for King County signed an order granting the prayer in said petition and allowing the plaintiff herein to be substituted in her own right and as the administra-

trix of the said J. W. Frescoln, deceased, as the plaintiff in said original action.

IV.

That on the 7th day of December, 1914, the said Anna Frescoln, individually and as administratrix, as aforesaid, filed and served a supplemental complaint, setting forth in addition to the matters set forth in the original complaint the death of said J. W. Frescoln and the expenses incident thereto.

V.

That on the 2d day of January, 1915, the defendant herein served and filed its answer; that a copy of said supplemental complaint and the answer thereto are hereto attached and marked respectively Defendant's Exhibits "D" and "E" and made a part hereof as though fully set forth herein.

VI.

That thereafter and on the 16th day of March, 1915, the said cause came on for trial upon the original complaint and upon the supplemental complaint, and upon the answer thereto, and upon the reply to the original answer, before a jury in Department No. 6 of the Superior Court of the State of Washington, Honorable King Dykeman, Judge; and that thereafter, upon the 18th day of March, 1915, the jury returned a verdict for the plaintiff in the [8] sum of twenty-five hundred and fifty dollars (\$2,550).

VII.

That upon the same day, and before the verdict of the jury was entered, the defendant herein filed a motion for judgment *non obstante veredicto*, which motion was thereafter argued before said Court and

that on the 5th day of April, 1915, the said Court granted said motion and granted said judgment and entered a judgment for defendant in said cause, the verdict of the jury notwithstanding. That a copy of said judgment of the Court is hereto attached and marked Defendant's Exhibit "F" and made a part hereof as though fully set forth herein.

VIII.

That all of the matters set forth in the complaint in this present cause were fully set forth and litigated in the trial of said cause in the Superior Court of King County, and that the judgment of said Court made on the 5th day of April, 1915, was given as the final judgment and is conclusive of all matters and causes claimed in the plaintiff's complaint herein.

IX.

That the plaintiff in said cause in the Superior Court of King County has appealed from the judgment of said court to the Supreme Court of the State of Washington.

WHEREFORE, in consideration of the premises the defendant prays that the plaintiff may not have and maintain her said action against this defendant, and defendant further prays that no trial of this present cause be had until such time as the original cause has been decided by the Supreme Court of the State of Washington.

JAMES B. HOWE,
H. S. ELLIOTT,

Attorneys for Defendant. [9]

State of Washington,
County of King,—ss.

D. W. Henderson, being first duly sworn, on oath deposes and says: That he is the superintendent of transportation of the Puget Sound Traction, Light & Power Company, a corporation, defendant in the within-entitled action; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true. That he makes this verification because said defendant is a corporation and affiant is its superintendent of transportation.

D. W. HENDERSON.

Subscribed and sworn to before me this 7th day of July, 1915.

[Seal]

R. E. SHARPE,
Notary Public in and for the State of Washington,
Residing at Seattle. [10]

**Defendant's Exhibit "A" to Answer—Complaint in
Frescoln vs. P. S. T., L. & P. Co., in Superior
Court.**

*In the Superior Court of the State of Washington,
in and for the County of King.*

No.—.

J. W. FRESCOLN,

Plaintiff,

vs.

THE PUGET SOUND TRACTION, LIGHT &
POWER COMPANY, a Corporation,
Defendant.

The plaintiff complains of the defendant and for cause of action alleges:

I.

That the defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, with its principal place of business in the City of Seattle, King County, Washington, and has been such during all the times referred to in this complaint.

II.

That at all times referred to herein, defendant was the owner of and was operating and maintaining a certain electric street railway line over and on Queen Anne Avenue, a public street within the corporate limits of the City of Seattle, King County, State of Washington, under and by virtue of a certain franchise granted to defendant or its predecessors by the said City of Seattle and that said electric street railway was a common carrier of passengers for hire.

III.

That on or about the 22d day of November, 1913, while plaintiff was a passenger on one of defendant's passenger cars, then being regularly operated by said defendant company, on its said electric street railway line on said [11] Queen Anne Avenue near the Mercer Street crossing. The defendant operated said car in such a careless, reckless and negligent manner that the plaintiff was without warning, suddenly and violently thrown from the steps and thru the open gates of said car to the paved street, striking upon the left side of his head, receiving a severe cut, bruise, and laceration of the

head and face, straining the cords, ligaments and muscles of his neck and body and severely jarring his whole body, rendering him for a time, wholly unconscious, whereby plaintiff became severely sick, causing vomiting, sore and lame, and was confined to his bed and suffered great bodily pains, mental anguish, weakness and loss of memory, leaving his left eye blackened and bloodshot, greatly affecting its sight, and he was compelled to employ a doctor and surgeon, to dress and sew up said cut on his head and give him general attendance and treatment, and the said injuries are permanent.

IV.

That by reason of the pain and suffering which plaintiff was compelled to endure and which he still endures and which he will be compelled to suffer, he has been damaged in the sum of five thousand (5,000) dollars; that he has been compelled to expend to the present time for attendance of a doctor and surgeon, the sum of forty (40) dollars; for the services of a nurse the sum of fifty (50) dollars; for drugs and medicines eighty (80) dollars; and for the loss of time, two hundred and twenty-five (225) dollars.

V.

That previous to the injuries herein referred to, plaintiff was and is now a minister of the gospel and pastor of a church in the city of Seattle and capable of earning a salary of one hundred and fifty (150) dollars per month, [12] and that by reason of said injuries could not fill his pulpit or discharge the

duties of a pastor for six weeks from the date of said injury.

VI.

That on account of the personal injuries aforesaid, the physical pain, mental anguish, expenditures incurred for doctor and surgeon, for drugs and medicines and nurse hire up to the present time and for the pain and suffering on account of said injuries, plaintiff has been damaged in the sum of five thousand three hundred and twenty-three dollars (\$5,323), no part of which has been paid.

WHEREFORE, plaintiff prays for judgment against defendant for the sum of five thousand three hundred and twenty-three (5,323) dollars and for costs and disbursements herein incurred.

THOS. H. BAIN,
Attorney for Plaintiff.

State of Washington,
County of King,—ss.

J. W. Frescoln, being first duly sworn, says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

J. W. FRESCOLN.

Subscribed and sworn to before me this 21st day of January, A. D. 1914.

THOS. H. BAIN,
Notary Public in and for the State of Washington,
Residing at Seattle. [13]

**Defendant's Exhibit "B" to Answer—Answer in
Frescoln vs. P. S. T. L. & P. Co. in Superior
Court.**

*In the Superior Court of the State of Washington
for King County.*

No. —.

J. W. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Comes now the defendant, and, for answer to the
complaint of the plaintiff herein, shows

I.

For answer to the third paragraph of the com-
plaint, the defendant denies the same.

II.

For answer to the fourth paragraph of the com-
plaint, the defendant denies the same, and especially
denies that the plaintiff has been damaged in the
sum of five thousand dollars (\$5,000), or in any
other sum, or at all. Further, it especially denies
that the plaintiff has been compelled to expend the
sum of forty dollars (\$40) for attendance of a sur-
geon and doctor; especially denies that he expended
the sum of fifty dollars (\$50) for a nurse; especially
denies that he expended the sum of eighty dollars
(\$80) for medicines; and further, especially denies

that plaintiff has suffered loss of time to the value of two hundred and twenty-five dollars (\$225).

III.

For answer to the fifth paragraph of the complaint, the defendant has no knowledge or information sufficient to form a belief and therefore denies the same. [14]

IV.

For answer to the sixth paragraph of the complaint, the defendant denies the same, and especially denies that the plaintiff has been damaged in the sum of five thousand three hundred and twenty-three dollars (\$5,323), or in any other sum, or at all.

For a further answer and affirmative defense to plaintiff's complaint, this defendant alleges: That whatever injuries, if any, plaintiff received were caused and contributed to by his own careless acts and negligence.

WHEREFORE, Defendant prays that it may go hence with its costs.

JAMES B. HOWE,

H. S. ELLIOTT,

Attorneys for Defendant. [15]

State of Washington,

County of King,—ss.

G. A. Richardson, being first duly sworn, on oath deposes and says: That he is the supt. of railways of the Puget Sound Traction, Light & Power Company, a corporation, defendant in the above-entitled action; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

That he makes this verification because defendant is a corporation and affiant is its supt. of railways.

G. A. RICHARDSON,

Subscribed and sworn to before me this 11th day of February, 1914.

R. G. SHARPE,

Notary Public in and for the State of Washington,
Residing at Seattle. [16]

**Defendant's Exhibit "C" to Answer—Reply in
Frescoln vs. P. S. T. L. & P. Co. in Superior
Court.**

*In the Superior Court of the State of Washington
for King County.*

No. —.

J. W. FRESCOLN,

Plaintiff,

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Comes now the plaintiff herein and for reply to the affirmative defense set forth in the answer of defendant, plaintiff denies the same.

WHEREFORE, Plaintiff prays for a judgment as demanded in his complaint.

THOS. H. BAIN,

Attorney for Plaintiff. [17]

**Defendant's Exhibit "D" to Answer—Supplemental
Complaint in Frescoln vs. P. S. T. L. & P. Co. in
Superior Court.**

*In the Superior Court of the State of Washington
in and for the County of King.*

No. 99,677.

ANNA F. FRESCOLN, Individually and as the Ad-
ministratrix of the Estate of J. W. FRES-
COLN, Deceased,

Plaintiff,

vs.

THE PUGET SOUND TRACTION, LIGHT &
POWER COMPANY, a Corporation,

Defendant.

The plaintiff further complains of the above-
named defendant and alleges:

I.

That on the 15th day of September, 1914, the
original plaintiff in this action, J. A. Frescoln, died
at his home in the city of Seattle, King County,
Washington.

II.

That continuously after receiving the injuries as
alleged in the original complaint herein, and up to
the time of his death, the said J. W. Frescoln suf-
fered great bodily pain and mental disturbance,
and great loss of sleep and severe nervous exhaus-
tion and nervous attacks, demanding frequent calls
and treatment of his physician and nursing and care

by his wife and friends. That he grew weaker and weaker and said nervous attacks became more frequent and severe until the date of his death.

III.

That by reason of the pain and suffering which said J. W. Frescoln was compelled to endure from the time of receiving said injuries up to the time of his death, he was damaged in the [18] sum of twenty thousand (\$20,000) dollars; that he was compelled to have the care and attendance of a physician and surgeon at an expense of \$55 and for service of a nurse in the sum of \$50; for drugs and medicine eight dollars, for all of which he agreed to pay; and for the loss of time to the value of \$500.

IV.

That by reason of his physical and mental suffering his loss of sleep, his nervous attacks, loss of bodily and mental health, loss of wages and earning power, his obligation to pay for medicines and medical attendance and the attendance of a physician and his subsequent death, together with all other damages alleged heretofore in the complaint, were caused and occasioned solely by reason of the fault, negligence, carelessness and recklessness of the defendant, its agents and servants, all as alleged in the complaint filed in this action.

V.

That the plaintiff, Anna F. Frescoln is the widow of said J. W. Frescoln, deceased, and that this plaintiff, Anna F. Frescoln is the duly appointed, qualified and acting administratrix of the estate of said J. W. Frescoln, deceased.

VI.

That the plaintiff is continuing and prosecuting this action for the joint benefit of herself and the estate of said deceased, J. W. Frescoln, as the widow and administratrix respectively of said deceased.

WHEREFORE, this plaintiff prays judgment against said defendant in the sum of twenty thousand six hundred and thirteen (\$20,613) dollars and for all proper costs incurred herein.

THOS. H. BAIN,
Attorney for Plaintiff. [19]

State of Washington,
County of King,—ss.

Anna F. Frescoln, being first duly sworn on oath says: That she is the plaintiff and administratrix named in the above-entitled action; that she has read the foregoing supplemental complaint, knows the contents thereof and believes the same to be true.

ANNA F. FRESCOLN.

Subscribed and sworn to before me this 7th day of December, 1914.

THOS. H. BAIN,
Notary Public for the State of Washington, Residing at Seattle. [20]

**Defendant's Exhibit "E" to Answer—Answer to
Supplemental Complaint in Frescoln vs. P. S. T.
L. & P. Co. in Superior Court.**

*In the Superior Court of the State of Washington
for King County.*

No. 99,677.

ANNA F. FRESCOLN, Individually and as the Ad-
ministratrix of the Estate of J. W. FRES-
COLN, Deceased,

Plaintiff,

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Comes now the defendant and for answer to the
Supplemental Complaint of the plaintiff filed herein,
shows:

I.

For answer to the second paragraph of the Sup-
plemental Complaint, the defendant denies the same.

II.

For answer to the third paragraph of the Supple-
mental Complaint, the defendant denies the same,
and especially denies that the said J. W. Frescoln
up to the time of his death was damaged in the sum
of twenty thousand dollars (\$20,000), or in any other
sum or at all, and further the defendant denies each
and every other allegation of said paragraph III.

III.

For answer to the fourth paragraph of the Supplemental Complaint the defendant denies the same.

IV.

For answer to the fifth paragraph of the Supplemental Complaint the defendant denies that the plaintiff has been damaged in the sum of twenty thousand six hundred and thirteen dollars (\$20,613), or in any other sum or at all. [21]

WHEREFORE the defendant prays that it may go hence with its costs.

JAMES B. HOWE,
H. S. ELLIOTT,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

G. A. Richardson, being first duly sworn, on oath deposes and says: That he is the superintendent of railways of the Puget Sound Traction, Light & Power Company, a corporation, defendant in the within entitled action; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true. That he makes this verification because said defendant is a corporation and affiant is its superintendent of railways.

G. A. RICHARDSON,

Subscribed and sworn to before me this 2d day of January, 1915.

R. G. SHARPE,
Notary Public in and for the State of Washington,
Residing at Seattle. [22]

**Defendant's Exhibit "F" to Answer—Judgment
Dismissing Action in Frescoln vs. P. S. T. L. &
P. Co. in Superior Court.**

*In the Superior Court of the State of Washington
for King County.*

No. 99,677.

ANNA F. FRESCOLN, Individually and as the Ad-
ministratrix of the Estate of J. W. FRES-
COLN, Deceased,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**JUDGMENT DISMISSING ACTION THE VER-
DICT OF THE JURY NOTWITHSTAND-
ING.**

This cause having come regularly on for trial on March 17, 1915, the plaintiff appearing by her counsel Thomas H. Bain, and the defendant appearing by its counsel, H. S. Elliott, and a jury having been empaneled and the plaintiff and defendant respectively having presented their evidence, and the case having been submitted to the jury and thereafter on March 18, 1915, the jury having returned a verdict for the plaintiff for twenty-five hundred and fifty dollars (\$2,550), and before the entry of the judgment upon said verdict, the defendant having moved for judgment of dismissal notwithstanding the verdict, and the Court having ordered that

the entry of the judgment be held in abeyance until the Court's decision upon said motion; and said motion of the defendant for judgment notwithstanding the verdict having come regularly on for hearing on April 5, 1915, and both parties being represented by their respective counsel, and arguments of the respective counsel having been heard, and the Court being fully advised in the premises:

Now therefore, it is hereby ordered, adjudged and decreed that the verdict of the jury entered herein on March 18, 1915, be, and the same is, hereby set aside and held for naught, [23] and it is ordered and adjudged that the plaintiff take nothing by reason of her complaint herein and that the above-entitled action be, and the same is, hereby dismissed; and

It is further ordered, adjudged and decreed that the defendants do have and recover of and from the plaintiff its costs and disbursements herein.

Done in open court this 7th day of April, 1915.

O. K. as to form.

THOS. H. BAIN,

Attorney for Plaintiff.

Copy of within Answer received and services acknowledged this 7th day of July, 1915.

THOS. H. BAIN,

Attorney for Plaintiff.

[Indorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 7, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [24]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**Motion to Strike Second Affirmative Defense and
Plea in Bar, etc.**

Comes now the above-named plaintiff and moves the Court for an order to strike from the Answer of the defendant filed herein and every paragraph of the second Affirmative Defense and Plea in Bar and also exhibits "A," "B," "C," "D," "E" and "F" of said Answer, for the reason that all of said matter is irrelevant and has nothing to do with the action brought under the above title and for the further reason that the action referred to in said matter was brought and maintained under a different provision of the law and Statute of the State of Washington.

THOS. H. BAIN,

Attorney for Plaintiff.

State of Washington,
County of King,—ss.

Thos. H. Bain, being first duly sworn on oath says:
That he is the attorney for the plaintiff in the above-

entitled action; that he has read the foregoing motion to strike, knows the contents thereof and believes the same to be true, meritorious and well founded in law.

[Seal]

THOS. H. BAIN.

Subscribed and sworn to before me this 17th day of July, 1915.

CHAS. PETROVITSKY,

Notary Public for the State of Washington, Residing at Seattle. [25]

Service of the within Motion to Strike by delivery of a copy to the undersigned is hereby acknowledged this —— day of July, 1915.

H. S. ELLIOTT,

Attorney for Defendant.

[Indorsed]: Motion to Strike. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 17, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [26]

*United States District Court, Western District of
Washington, Northern Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Filed August 6, 1915.

**Opinion on Motion to Strike Affirmative Defense in
Frescoln vs. P. S. T. L. & P. Co.**

**ON MOTION TO STRIKE AFFIRMATIVE
DEFENSE—MOTION DENIED.**

THOMAS H. BAIN, for Plaintiff.

JAMES B. HOWE, for Defendant.

H. S. ELLIOTT, for Defendant.

NETERER, District Judge:

This is an action commenced by Anna F. Frescoln, widow of J. W. Frescoln, to recover \$25,000 for the death of her husband. It is alleged that on the 22d day of November, 1913, J. W. Frescoln was, through the careless and reckless operation of the street-car upon which he was a passenger, killed. The defendant has answered, setting forth certain affirmative defenses, one of which alleges, in substance, that on January 22, 1914, the deceased, J. W. Frescoln, had commenced an action in the Superior Court of King County against this defendant, for injuries received at the time and upon the facts and under the conditions set forth in the complaint of the plaintiff; that the issues in the said cause were made up and the cause set for trial on October 13, 1914; that on the 15th of September, 1914, the said J. W. Frescoln died; that thereafter, upon application, plaintiff was substituted in her own right and as administratrix; that she filed a supplementary complaint, to which the defendant answered, and on March 16, 1915, the cause came on for trial before a jury in the State court—that a verdict for plaintiff in the sum of \$2550 was returned;

but that upon motion, the [27] Court entered judgment for the defendant *non obstante veredicto*. The defendant prays that the plaintiff may not maintain this action until such time as such cause has been determined by the Supreme Court, where it is now pending on appeal. The various pleadings and orders in said action are attached to the answer as exhibits "A," "B," "C," "D," "E" and "F." The plaintiff has moved that these exhibits be stricken and that each paragraph of the said defense and plea in bar be stricken for the reason "that all of said matter is irrelevant and has nothing to do with the action brought under the above title, and for the further reason that the action referred to in said matter was brought and maintained under a different provision of the law and statute of the State of Washington."

An examination of the supplemental complaint filed in the state court proceeding shows that it was not a suit to recover for injuries suffered by her on account of her husband's death, but was a continuation of the action commenced by the husband for injuries to him, in which she was substituted as plaintiff in his stead for the benefit of herself and the estate, and sought to recover damages for the pain and suffering endured by the deceased up to the time of his death, medical expenses, etc., which proceeding was carried on under provisions of Section 194, Rem. & Bal. Code of Wash., which provides:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of

such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children. * * * ”

The plaintiff in this case seeks to recover damages because of injuries sustained by her personally, such as loss of affection and companionship, and loss of support which would be occasioned by reason of her husband's death, and this action is based upon Section 183, Rem. & Bal. Wash. Code, which provides:

“ * * * When the death of a person is caused by the wrongful act or neglect of another, his heirs or [28] personal representatives may maintain an action for damages against the person causing the death. * * * ”

This proceeding and the proceeding referred to were unknown to the common law and can only be maintained by reason of the provisions of the statutes of Washington. On the death of a husband who had commenced an action to recover damages for injuries to himself, the cause may be continued by the widow and minor children upon being properly substituted as plaintiffs, *Swanson vs. Pacific Coast Shipping Co.*, 60 Wash. 87; and the substitution of the widow in such action does not preclude her from instituting an action on her own behalf to

recover damages which are peculiar to herself. *Swanson v. Pacific Coast Shipping Co., supra; Thompson v. Seattle Ry. Co., 71 Wash. 436.* The right of recovery in either case is predicated upon some act of omission or commission on the part of the defendant in the discharge of an imposed duty. As set forth in the answer, the judgment of the State court was that the act of the defendant did not cause the death upon which either action was predicated. If the adjudication of the State court could be *res adjudicata* in this action, then the motion must be denied. Can the plaintiff commence an action wherein she seeks to recover damages to herself based upon acts of negligence of the defendant which a competent court has already adjudicated do not exist? While the right of recovery in the instant case is not the same right of recovery as in the other case, each case is predicated upon and supported by the same facts. It would seem to be rather an anomalous situation if a party could predicate a right of recovery and have judgment awarded against him, and die, and his widow thereafter, upon allegations of negligence, institute a proceeding based upon the same act of negligence, and be permitted to litigate over the same facts. Suppose that the first case had been tried prior to the decease of J. W. Frescoln and a verdict returned in favor of the plaintiff and judgment entered *non obstante veredicto* for the defendant [29] and he had then died, could the plaintiff be permitted to prosecute this action now in the face of the former judgment? The plaintiff in this case does not occupy a different relation than if the

other case had been adjudicated prior to J. W. Frescoln's death. The Supreme Court of Virginia, in *Brammer's Adm'r v. Norfolk & W. Ry. Co.*, in passing upon the same issue that is here presented, and upon the same statutory authority in 57 S. E., at page 595, said:

“It would be an anomalous situation if the language used in our statute could be so construed that after a court of competent jurisdiction has ascertained, in a suit brought by a party himself, that the wrongful acts which constitute the sole foundation of any recovery against the defendant are not of actionable character, and that the injured person is not entitled to maintain an action by reason of them, or to recover damages on their account, other parties, in another and subsequent proceeding, may proceed to show, in an action for their benefit, founded upon the same alleged acts of the defendant, that at the time of the intestate's death, he was as a matter of fact, the judgment of the Court to the contrary notwithstanding, entitled to maintain an action against the defendant company and to recover damages for the very acts in respect of which recovery was denied the very man who suffered the injuries which resulted in his death.”

The Supreme Court of the United States, in *Southern Pacific Ry. Co. v. U. S.*, 168 U. S. 1, holds to the principle that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of re-

covery cannot be disputed in a subsequent suit between the same parties or their privies. In that case the Court held that a former decision of the Court establishing the sufficiency of certain maps as to lands there in dispute was *res adjudicata* as to the sufficiency of such maps when the question was raised in the latter case, with reference to other lands in dispute, since the land in both suits had a common source of title, and the title depended upon the existence or nonexistence of the same state of facts.

Plaintiff's right of recovery in this case is based upon the assumption that the defendant was negligent. A competent [30] Court having adjudicated in favor of the defendant with relation to the negligent acts relied upon, the foundation of the plaintiff's right of recovery is removed, and until that judgment is reversed, the plaintiff's complaint can have no standing in this court.

The motion to strike is therefore denied.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 6, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [31]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Reply.

Comes now the plaintiff above named and for reply to the answer of the defendant herein alleges:

I.

Replying to the first special and affirmative defense of the defendant, plaintiff denies the same.

II.

For reply to paragraph I of second affirmative defense, plaintiff admits that on the 22d day of January, 1914, J. W. Frescoln commenced an action in the Superior Court of the State of Washington, King County, against the defendant, and denies all other allegations in said paragraph.

III.

Plaintiff herein admits the allegation in paragraphs II, III, IV, V, VI, VII and IX of said second affirmative defense.

IV.

Replying to paragraph VIII, plaintiff admits "the judgment of said Court on the 5th day of April, 1915,

was given as the final judgment." All other allegations in said paragraph are denied.

WHEREFORE, plaintiff demands judgment as prayed for in her petition filed herein.

THOS. H. BAIN,
Attorney for Plaintiff. [32]

State of Washington,
County of King,—ss.

Anna F. Frescoln, being first duly sworn, on oath says: That she is the plaintiff in the above-entitled action; that she has read the foregoing Reply, knows the contents thereof and believes the same to be true.

ANNA F. FRESCOLN.

Subscribed and sworn to before me this 26th day of October, 1915.

THOS. H. BAIN,
Notary Public for the State of Washington, Residing
at Seattle.

Service of the within Reply by delivery of a copy to the undersigned is hereby acknowledged this 27th day of Oct., 1915.

JAMES B. HOWE,
H. S. ELLIOTT,
Attorneys for Defendant.

[Indorsed]: Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 27, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy [33]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**Order Granting Leave to Plaintiff to Serve and File
Amended Reply.**

On motion of Thos. H. Bain, attorney for plaintiff in this action, notice thereof being duly served on the defendant's counsel, and after hearing thereon, it is hereby ordered that plaintiff have leave to serve and file an amended reply herein.

JEREMIAH NETERER,

Judge.

Service of the within Order by delivery of a copy to the undersigned is hereby acknowledged this 21st day of April, 1916.

JAMES B. HOWE and

H. S. ELLIOTT,

Attorneys for Defendant.

[Indorsed]: Order to File Amended Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 22, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [34]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Amended Reply.

Comes now the plaintiff above named, and by leave of the Court first had and obtained, files this her amended reply to the answer of the defendant herein and alleges:

I.

Replying to the first special and affirmative defense of the defendant, plaintiff denies the same.

II.

For reply to paragraph I of second affirmative defense, plaintiff admits that on the 22d day of January, 1914, J. W. Frescoln commenced an action in the Superior Court of the State of Washington, King County, against the defendant, and denies all other allegations in said paragraph.

III.

Plaintiff herein admits the allegations in paragraphs two, three, four, five, six, seven and nine of said second affirmative defense.

IV.

Replying to paragraph VIII, plaintiff admits "the judgment of said Court on the 5th day of April, 1915, was given as the final judgment." All other allegations in said paragraph are denied. [35]

V.

For other and further reply, plaintiff alleges that the appeal, referred to and alleged in paragraph IX of defendant's second affirmative defense was duly and regularly prosecuted in the Supreme Court of the State of Washington, and that on February 29, 1916, said Court handed down its opinion, as set forth in 47 Wash. Dec. 520, reversing the decision of the Superior Court and instructing said Court to enter a judgment upon the verdict and that the remittitur was sent down and filed April 12, 1916, in the Superior Court of King County, Washington, and on April 15, 1916, judgment according to the verdict of the jury was signed by the Court and duly filed a copy of which judgment is hereby attached, marked exhibit "A" and made a part hereof, as though fully set forth herein.

Wherefore, the plaintiff prays that she may have and maintain her action herein against the defendant and that said cause be set down for hearing and that in consideration of the premises, she be granted judgment upon the pleadings and that a jury be called to assess the amount of the damages, to be paid the plaintiff by the defendant.

THOS. H. BAIN,
Attorney for Plaintiff.

State of Washington,
County of King,—ss.

Anna F. Frescoln being first duly sworn on oath, says: That she is the plaintiff in the above-entitled action; that she has read the foregoing Amended Reply, knows the contents thereof and believes the same to be true.

ANNA F. FRESCOLN,

Subscribed and sworn to before me this 19th day of April, 1916. [36]

THOS. H. BAIN,

Notary Public for the State of Washington, Residing at Seattle.

Exhibit "A" to Amended Reply.

*In the Superior Court of the State of Washington
for King County.*

No. 99,677.

ANNA F. FRESCOLN, Individually, and as Administratrix of the Estate of J. W. FRESCOLN, Deceased,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**JUDGMENT ACCORDING TO THE VERDICT
OF THE JURY.**

This cause having come regularly on for trial on March 17, 1915, the plaintiff appearing by her

counsel, Thos. H. Bain, and the defendant appearing by its counsel, H. S. Elliott, and a jury having been empaneled and the plaintiff and defendant respectively having presented their evidence, and cause having been submitted to the jury, and thereafter on March 18, 1915, the jury having returned a verdict for the plaintiff for the sum of twenty-five hundred (\$2500) dollars, and the defendant having moved for judgment of dismissal notwithstanding the verdict, and said motion having come regularly on for hearing on April 5, 1915, and arguments of counsel having been heard and said motion submitted to the Court, and the Court having sustained said motion and order and decreed that the verdict of the jury be set aside and held for naught and dismissed said entitled action, and gave judgment that defendant recover from plaintiff its costs and disbursements; and the plaintiff having duly and regularly appealed from said decision to the Supreme Court of the State of Washington, and said Court having on February 29, 1916, handed down its opinion reversing said decision of this Court with instructions to enter judgment upon the Verdict, and the remittitur having been sent down and filed in this court on April 12, 1916, with costs of the Supreme Court taxed at ninety-five and 30/100 (\$95.30) dollars and the Court being fully advised in the premises;

Now therefore it is hereby ordered, adjudged and decreed that said plaintiff do have and recover of and from said defendant, the Puget Sound Traction, Light & Power Company, a corporation, the sum of

twenty-five hundred (\$2,500) dollars with interest thereon at the rate of six (6) per cent per annum from the date hereof until paid, together with ninety-five and 30/100 (\$95.30) dollars, costs of the Supreme Court and for plaintiff's costs and disbursements incurred in this action in this court to be taxed, and let execution issue.

Done in open court this 15th day of April, 1916.

KING DYKEMAN,
Judge.

EXHIBIT "A."

Service of the within Amended Reply by delivery of a copy to the undersigned is hereby acknowledged this 21st day of April, 1916.

JAMES B. HOWE and
H. S. ELLIOTT,
Attorneys for Defendant. [37]

[Endorsed]: Amended Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 24, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [38]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess her damages in the sum of \$4,500, four thousand five hundred dollars.

CHAS. McALISTER,

Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist. of Washington. June 30, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[39]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Decree.

This cause coming on duly and regularly for trial on the 28th day of June, 1916; plaintiff appearing in person, and by her attorney, Thomas H. Bain, and defendant, the Puget Sound Traction, Light & Power Company, a Corporation, appearing by its attorney, H. S. Elliott.

A jury of twelve men were regularly impaneled and sworn to try said action; witnesses on the part

of plaintiff were sworn and examined; after having heard the evidence and instructions of the Court, and arguments of counsel, the jury retired to consider its verdict, and subsequently returned into court, and being called, answered their names and says:

That they find a verdict for the plaintiff in the sum of four thousand five hundred (\$4,500) dollars and costs in this action.

Wherefore, by virtue of the law, and by reason of the premises aforesaid:

It is considered, ordered, adjudged and decreed, that said plaintiff have and recover of and from said defendant, the Puget Sound Traction, Light & Power Company, a corporation, the sum of \$4,500 with interest thereon at the rate of six (6%) [40] per cent per annum from the date hereof, until paid, together with plaintiff's costs and disbursements incurred in this action to be taxed, and that execution issue, to all of which debt. excepts and same is noted.

Done in open court this 10th day of July, A. D. 1916.

JEREMIAH NETERER,

Judge.

Service of the within Decree by delivery of a copy to the undersigned is hereby acknowledged this 3d day of July, 1916, to be presented July 10, 1916.

JAMES B. HOWE and

H. S. ELLIOTT,

Attorneys for Defendant.

[Indorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Divi-

42 *Puget Sound Traction etc. Company*

sion. July 10, 1916. Frank L. Crosby, Clerk. By
Ed M. Lakin, Deputy. [41]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Petition for a New Trial.

To the Honorable JEREMIAH NETERER, Judge
of Said Court:

The defendant Puget Sound Traction, Light &
Power Company appearing by its counsel, H. S.
Elliott, petitions this Honorable Court for a new
trial in the above-entitled cause for the following
causes materially affecting the substantial rights of
the defendant:

I.

Insufficiency of the evidence to justify the verdict.

II.

Errors in law occurring at the trial.

SPECIFICATION I.

In support of the first of the above causes, namely,
insufficiency of the evidence to justify the verdict,
the defendant specifies the following pleadings, being

the only pleadings served and filed in the above-entitled action, namely, plaintiff's complaint, defendant's answer, and exhibits attached thereto; plaintiff's reply, and plaintiff's amended reply, and exhibits attached thereto, the same being all of the pleadings in said cause in which no amendments were made during the trial thereof and in support of which all of the evidence offered or introduced during the trial was limited. The defendant further specifies that the testimony given under said pleadings disclosed the fact that J. W. Frescoln, for whose [42] death the plaintiff in this action sought to recover damages, had in his lifetime instituted an action in the Superior Court for King County, State of Washington, to recover damages for the personal injuries sustained by said J. W. Frescoln, which it is claimed in this action resulted in his death and that upon the death of said J. W. Frescoln said former action had been revived and prosecuted by Anna F. Frescoln, individually, and as the administrator of the estate of J. W. Frescoln, deceased, and that in said action the said substituted plaintiff had prior to the trial of this action recovered a judgment against the defendant in the sum of two thousand five hundred dollars (\$2,500), which judgment had been paid and satisfied by the defendant, and that when said parties were substituted as party plaintiff therein, they filed in said prior action a supplemental complaint setting forth the death of said J. W. Frescoln, and that under the statutes of the State of Washington, if a person sustains a personal injury resulting in his death and prior to his

death institutes an action to recover damages for said personal injuries and subsequent to his death such action is revived and prosecuted to judgment by the widow or other representatives of said deceased person, and said judgment is satisfied by the defendant, said judgment is a bar to an action by the said widow or other heirs, or the personal representatives of the deceased person.

SPECIFICATION II.

In support of the second cause for a new trial, errors in law occurring at the trial, this defendant assigns three separate errors occurring at the trial and on account of which errors a new trial is requested.

I.

Error because the Court refused to sustain the objections of the defendant made after the jury was impaneled and sworn, and [43] before any testimony had been introduced; to the introduction of any testimony in the cause, for the reason that it was admitted by the pleadings that J. W. Frescoln, for whose death the plaintiff in this action is seeking to recover damages, had in his lifetime instituted an action in the Superior Court for King County, State of Washington, to recover damages for the personal injuries sustained by said J. W. Frescoln (and that afterward and before trial of said cause, said J. W. Frescoln died) and that upon the death of said J. W. Frescoln, said action had been revived and prosecuted by order of the Court in the name of Anna F. Frescoln, individually and as administratrix of the estate of said J. W. Frescoln, deceased, and that in

said action the said substituted plaintiff had prior to the commencement of this action recovered a judgment against the defendant in the sum of two thousand five hundred dollars (\$2,500), which said judgment had been paid and satisfied by the defendant, and that when Anna F. Frescoln, individually and as administratrix of the estate of J. W. Frescoln, deceased, was substituted as party plaintiff therein, said substituted plaintiff filed in said prior action a supplemental complaint setting forth the death of said J. W. Frescoln and that under the statutes of the State of Washington, if a person sustains a personal injury resulting in his death, and prior to his death institutes an action to recover damages for said personal injuries and subsequent to his death said action is revived and prosecuted to judgment by the substituted parties of said deceased person and said judgment is satisfied by the defendant, said judgment is a bar to the action by said widow or any other heirs or the personal representatives of the deceased to recover damages for the death of said deceased person.

In furtherance of this motion, the defendant further specifies the pleadings and the exhibits attached to and made a part [44] of the pleadings in the above-entitled action in support of this, its first allegation of error in law occurring at the trial.

II.

Because the Court refused to sustain the motion of the defendant, made after the jury was impaneled and sworn and before any testimony had been introduced, for judgment for the defendant on the plead-

ings, for the reason that it was admitted by the pleadings sought to recover damages had in his lifetime instituted an action in the Superior Court for King County, State of Washington, to recover damages for the personal injuries sustained by said J. W. Frescoln which it is claimed in this action resulted in his death and that upon the death of said J. W. Frescoln said former action had been revived and prosecuted by Anna F. Frescoln, individually and as the administratrix of the estate of J. W. Frescoln, deceased, and that in said action the said substituted plaintiff had prior to the trial of this action recovered a judgment against the defendant in the sum of two thousand five hundred dollars (\$2,500), which judgment had been paid and satisfied by the defendant and that when said parties were substituted as party plaintiff therein they filed in said prior action a supplemental complaint setting forth the death of said J. W. Frescoln, and that under the statutes of the State of Washington, if a person sustains a personal injury resulting in his death and prior to his death institutes an action to recover damages for said personal injuries and subsequent to his death said action is revived and prosecuted to judgment by the widow or other representatives of said deceased person and said judgment is satisfied by the defendant said judgment is a bar to an action by the said widow, or any other heirs or the personal representative of the deceased to recover damages for the death of said deceased person. Said objection and motion of the defendant. [45] was denied and overruled by the Court and to the denial thereof the defendant

duly excepted and its exception was allowed. The defendant submits the pleadings and the exhibits attached to and made a part of said pleadings in the above-entitled action in support of this its second allegation of error in law occurring at the trial.

III.

Because the Court refused to grant the motion of the defendant, made in writing, to instruct the jury to return a verdict for the defendant, this motion having been made after the jury had been duly impaneled and sworn and after the plaintiff had submitted all of her evidence and the defendant had submitted all of its evidence and before the jury retired to consider of its verdict (no evidence having been offered or introduced at said trial, either by plaintiff or defendant, except in support of the issues raised by the pleadings herein). This defendant further specified as ground for this particular error, the allegations in its first and second allegations of the error in law occurring at the trial as above set forth.

JAMES B. HOWE,

H. S. ELLIOTT,

Attorneys for Defendant.

Copy of the within Petition for New Trial received and service of the same acknowledged this 10th day of August, 1916.

THOS. H. BAIN,

Attorney for Plaintiff.

[Indorsed]: Petition for a New Trial. Filed in the U. S. District Court, Western Dist. of Washington,

Northern Division. Aug. 11, 1916. Frank L. Crosby,
Clerk. [46]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Order Denying Petition for New Trial.

This matter coming on to be heard upon the petition for a new trial, filed by the defendant herein, and said petition being examined by the Court, and the Court being duly advised, it is ordered that the Petition for a new trial in this action be, and the same is hereby, denied to all of which defendant excepts, which exception is hereby allowed.

Done in open court this 21st day of September,
A. D. 1916.

JEREMIAH NETERER,

Judge.

O. K.—J. B. HOWE and

H. S. ELLIOTT,

Attys. for Dft.

[Indorsed]: Order Denying Petition for New Trial.
Filed in the U. S. District Court, Western Dist. of

Washington, Northern Division. Sept. 21, 1916.
Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[47]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

FIRST EXCEPTION.

BE IT REMEMBERED, That in the trial of this cause on the 28th day of June, 1916, before the Honorable Jeremiah Neterer, both parties appearing by counsel, the jury was duly impaneled and sworn, and thereafter and before any evidence was introduced, either by the plaintiff or by the defendant, the defendant by its counsel, H. S. Elliott, objected to the introduction of any testimony in the case for the reason that it was admitted by the pleadings that J. W. Frescoln for whose death the plaintiff in this action is seeking to recover damages, had in his lifetime instituted an action in the Superior Court for King County, State of Washington, to recover damages for the personal injuries sustained by said

J. W. Frescoln (and that afterwards and before trial of said case said J. W. Frescoln died), and that upon the death of said J. W. Frescoln said action had been revived and prosecuted by order of the court in the name of Anna F. Frescoln individually and as the administratrix of the estate of J. W. Frescoln, deceased, and that in said action the said substituted plaintiff had prior to the commencement of this action recovered a judgment against the defendant in the sum of two thousand five hundred dollars (\$2,500), which judgment had been paid and satisfied by the defendant and that when Anna F. Frescoln, individually and as administratrix of the estate of J. W. Frescoln, [48] deceased, was substituted as party plaintiff therein, said substituted plaintiff filed in said prior action a supplemental complaint setting forth the death of said J. W. Frescoln, and that under the statutes of the State of Washington if a person sustains a personal injury resulting in his death and prior to his death institutes an action to recover damages for said personal injuries and subsequent to his death said action is revived and prosecuted to judgment by the substituted parties of said deceased person and said judgment is satisfied by the defendant said judgment is a bar to an action by the said widow, or any other heirs or the personal representative of the deceased to recover damages for the death of said deceased person. Said objection and motion of the defendant was denied and overruled by the Court and to the denial thereof the defendant duly excepted and its exception was al-

lowed. The defendant submits the pleadings and the exhibits attached to and made a part of said pleadings in the above-entitled action in support of this its First Exception.

That the only pleadings served and filed in the above-entitled action were the following Plaintiff's Complaint, Defendant's Answer and exhibits thereto attached, Plaintiff's Reply, Plaintiff's Amended Reply and exhibits thereto attached. That no trial amendments to the pleadings herein were proposed by either party and that no evidence was offered or introduced during the trial of said cause by either plaintiff or defendant except in support of the issues raised by the pleadings herein.

SECOND EXCEPTION.

In the trial of this cause on the 28th day of June, 1916, before the Honorable Jeremiah Neterer, both parties appearing by counsel, the jury was duly empaneled and sworn, and thereafter [49] and before any evidence was introduced either by the plaintiff or the defendant, the defendant by its counsel, H. S. Elliott, moved the Court for judgment for the defendant on the pleadings for the reason that it was admitted by the pleadings that J. W. Frescoln for whose death the plaintiff in this action sought to recover damages had in his lifetime instituted an action in the Superior Court for King County, State of Washington, to recover damages for the personal injuries sustained by said J. W. Frescoln, which it is claimed in this action resulted in his death, and that upon the death of said J. W. Frescoln said former action had been revived and

prosecuted by Anna F. Frescoln, individually and as the administratrix of the estate of J. W. Frescoln, deceased, and that in said action the said substituted plaintiff had prior to the trial of this action recovered a judgment against the defendant in the sum of two thousand five hundred dollars (\$2,500), which judgment had been paid and satisfied by the defendant and that when said parties were substituted as party plaintiff therein they filed in said prior action a supplemental complaint setting forth the death of said J. W. Frescoln, and that under the statutes of the State of Washington if a person sustains a personal injury resulting in his death and prior to his death institutes an action to recover damages for said personal injuries and subsequent to his death said action is revived and prosecuted to judgment by the widow or other representatives of said deceased person and said judgment is satisfied by the defendant said judgment is a bar to an action by the said widow, or any other heirs or the personal representative of the deceased to recover damages for the death of said deceased person. Said objection and motion of the defendant was denied [50] and overruled by the Court and to the denial thereof the defendant duly excepted and its exception was allowed. The defendant submits the pleadings and the exhibits attached to and made a part of said pleadings in the above-entitled action in support of this its Second Exception.

That the only pleadings served and filed in the above-entitled action were the following Plaintiff's Complaint, Defendant's Answer and exhibits thereto

attached, Plaintiff's Reply, and Plaintiff's Amended Reply and exhibits thereto attached. That no trial amendments to the pleadings herein were proposed by either party and that no evidence was offered or introduced during the trial of said cause by either plaintiff or defendant, except in support of the issues raised by the pleadings herein.

THIRD EXCEPTION.

In the trial of the above-entitled action on June 28, 1916, before the Honorable Jeremiah Neterer and after the jury was duly impaneled and sworn, and after the plaintiff had submitted all of her evidence and the defendant had submitted all of its evidence, and before the jury retired to consider of its verdict (no evidence having been offered or introduced at said trial, either by plaintiff or defendant, except in support of the issues raised by the pleadings herein) the defendant in writing moved the Court to instruct the jury to return a verdict for the defendant. Such request and motion of the defendant was denied by the Court and to the denial thereof the defendant duly excepted and its exception was allowed. [51]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Order Allowing Bill of Exceptions.

The above-named defendant having on July 7, 1916, duly served upon the attorneys for the plaintiff a proposed bill of exceptions and the attorneys for the plaintiff having on July 13, 1916, duly served upon the attorneys for defendant proposed amendments to the bill of exceptions proposed by defendant, and the said proposed bill of exceptions together with the amendments thereto proposed by the plaintiff having been delivered on July 17, 1916, by the attorneys for the defendant to the clerk of the above-entitled court for the Judge thereof, and the clerk having thereafter delivered said proposed bill of exceptions and amendments to the Judge of the above-entitled court, and the Judge having designated Monday, July 24, 1916, at the hour of 10 o'clock A. M. as the time at which he would settle the bill of exceptions, and said hearing having been, with the consent of counsel, continued until Monday, July 31, 1916, at the hour of 10 o'clock A. M.

and at said time plaintiff being represented by her attorney, Thomas H. Bain, Esq., and the defendant being represented by counsel and both parties having consented to the settling of the foregoing bill of exceptions, and the said foregoing bill of exceptions conforming to the truth and being in proper form;

Now, therefore, I the undersigned Judge of the above-entitled court and the Judge who tried the above-entitled action, hereby certify that the above and foregoing bill is [52] a true bill of exceptions, and the same is hereby approved, allowed and settled, and ordered filed and made a part of the record in the above-entitled cause.

Done in open court this 31st day of July, 1916.

JEREMIAH NETERER,

Judge.

O. K.

THOS. H. BAIN,

Attorney for Plaintiff.

[Indorsed]: Bill of Exceptions and Order Allowing Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. July 31, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[53]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes the Puget Sound Traction, Light & Power Company, a corporation, the defendant above named, in connection with its petition for writ of error herein makes the following assignment of errors and particularly specified the following as the errors upon which it will rely and which it will urge upon the prosecution of its said writ of error in the above cause, and which it avers occurred upon the trial of said cause, to wit:

I.

The Court erred in rendering judgment in favor of the plaintiff and against the defendant.

II.

The Court erred in refusing to sustain the objections of the defendant made after the jury was impaneled and sworn, and before any testimony had been introduced common to the introduction of any testimony in the cause.

III.

The Court erred in refusing to instruct the jury to return a verdict in favor of the defendant.

IV.

The Court erred in overruling the defendant's motion for a new trial. [54]

WHEREFORE, Said Puget Sound Traction, Light & Power Company, plaintiff in error, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said Court be instructed to grant a new trial of said cause.

JAMES B. HOWE,

H. S. ELLIOTT,

Attorneys for Defendant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 3, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [55]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Now comes the Puget Sound Traction, Light & Power Company, a corporation, defendant herein, and says: That on the 10th day of July, 1916, this Court entered judgment herein in favor of the plaintiff above named and against the defendant above named, and thereafter on the 5th day of September, 1916, this Court denied a motion for a new trial theretofore regularly made, and this Court having further on the 21st day of September, 1916, signed and filed an order denying the petition for a new trial, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record of the proceedings and all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES B. HOWE,
H. S. ELLIOTT,
Attorneys for Defendant.

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 3, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [56]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 3d day of November, 1916, came the defendant, Puget Sound Traction, Light & Power Company, a corporation, by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

On consideration whereof, the Court does hereby allow the writ of error prayed for. It is further ordered that a bond, in the sum of eleven thousand dollars (\$11,000), conditioned according to the law, be executed in behalf of the above-named defendant, with good and sufficient surety, to be approved by the undersigned, and that upon said bond being executed, approved and filed, the said judgment in this cause shall forthwith be superseded and all proceed-

ings in this cause stayed until the final determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 3d day of November, 1916.

JEREMIAH NETERER,

District Judge of the United States, for the Western District of Washington, presiding in said Circuit.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 3, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [57]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, Puget Sound Traction, Light & Power Company, a corporation, defendant above named, as principal, and the Massachusetts Bonding & Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the State of Mass-

achusetts, and duly authorized to become surety upon bonds and to transact business as a surety company in the State of Washington, as surety, are held and firmly bound unto Anna F. Frescoln, plaintiff above named, in the sum of eleven thousand dollars (\$11,000), lawful money of the United States, to be paid to said Anna F. Frescoln, her heirs, executors, administrators and assigns, for which payment well and truly to be made, we do hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 3d day of November, A. D. 1916.

Whereas, lately, at the regular term of the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between Anna F. Frescoln, plaintiff, and Puget Sound Traction, Light & Power Company, a corporation, defendant, a judgment was rendered in favor of said plaintiff and against said defendant in the sum of [58] four thousand five hundred dollars (\$4,500) and costs, and the said Puget Sound Traction, Light & Power Company having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Anna F. Frescoln, plaintiff as aforesaid, citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, in said circuit; Now, therefore, the condition of the above obligation

is such that if the said Puget Sound Traction, Light & Power Company shall prosecute its writ of error to effect and shall answer all costs and damages that may be awarded against it including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation shall be void, otherwise to remain in full force and effect.

It is hereby expressly agreed by said surety that in case of a breach of any condition hereof, the above-named District Court of the United States for the Western District of Washington, Northern Division, may, upon notice to said surety of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and award execution therefor.

PUGET SOUND TRACTION, LIGHT &
POWER COMPANY,

By A. L. KEMPSTER,

Manager.

[Seal]

Attest: JAMES B. HOWE,

Secretary.

MASSACHUSETTS BONDING AND IN-
SURANCE COMPANY,

[Seal]

By FRED B. POTWIN,

Attorney in Fact. [59]

The foregoing bond is hereby approved as a bond on writ of error and supersedeas bond, this 3d day of November, 1916.

JEREMIAH NETERER,

Judge of the District Court of the United States,
Presiding in the United States District Court
for the Western District of Washington,
Northern Division.

[Indorsed]: Bond on Writ of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division, Nov. 3, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [60]

**Order Extending Time to January 1, 1917, to File
Record, etc.**

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant

Now, this 27th day of November, 1916, upon motion of counsel for defendant and for sufficient cause appearing, it is ordered that the time within which the clerk of this court may prepare, certify and transmit to the United States Circuit Court of Ap-

peals the transcript of the record in this cause be, and the same is hereby extended to and including the 1st day of January, 1917.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order Extending Time to File Transcript. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. November 27, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [61]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Writ of Error.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict which is in the said District Court before you, or some of

you, between Anna F. Frescoln, the original plaintiff and defendant in error, and Puget sound Traction, Light & Power Company, a corporation, the original defendant and plaintiff in error, manifest error hath happened to the damage of said Puget Sound Traction, Light & Power Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit on the 3d day of December next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done. [62]

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 3d day of November, in the year of our Lord one thousand nine hundred and sixteen.

[Seal]

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington.

Copy of within Writ of Error received and service of the same acknowledged this 4th day of Nov. 1916.

THOS. H. BAIN,
Attorneys for Plaintiff.

[Indorsed]: Original. No. 3033. In the District Court of the United States, for the Western District of Washington, Northern Division. Anna F. Frescoln, Plaintiff, vs. Puget Sound Traction, Light & Power Company, a Corporation, Defendant, Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 3, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [63]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Citation on Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States of America to
Anna F. Frescoln, GREETING:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the

city of San Francisco, in the State of California, within thirty (30) days after the date of this Citation, pursuant to writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington Northern Division, wherein Puget Sound Traction, Light & Power Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 3d day of November, in the year of our Lord one thousand nine hundred and sixteen.

[Seal]

JEREMIAH NETERER,

Judge of the District Court of the United States,
Presiding in the District Court of the United
States for the Western District of Washington,
Northern Division. [64]

Copy of within Citation on Writ of Error received
and service of the same acknowledged this 4th day
of Nov., 1916.

THOS. H. BAIN,
Attorney for Plaintiff.

[Indorsed]: (Original.) No. 3033. In the District Court of the United States for the Western District of Washington, Northern Division. Anna F. Frescoln, Plaintiff, vs. Puget Sound Traction, Light & Power Company, a Corporation, Defendant. Citation on Writ of Error. Filed in the U. S. Dis-

trict Court, Western Dist. of Washington, Northern Division, Nov. 3, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. James B. Howe and H. S. Elliott. P. O. and Office Address, Room 403, Electric Building, 7th Ave. and Olive Street, Seattle, Wash., Attorneys for Defendant.[65]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3033.

PUGET SOUND TRACTION, LIGHT & POWER
Company, a Corporation,

Plaintiff in Error,

vs.

ANNA F. FRESCOLN,

Defendant in Error.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare, certify and forward, as provided by law, to the United States Circuit Court of Appeals for the Ninth Circuit as the record on writ of error, to the District Court of the United States for the Western District of Washington, Northern Division, a complete transcript of the following files, records and proceedings in the above-entitled cause to wit:

Complaint.

Answer.

Motion to Strike Affirmative Defense.

Order Denying Motion to Strike Affirmative Defense.

Reply.

Order Permitting Filing of Amended Reply.

Amended Reply.

Verdict.

Judgment.

Petition for New Trial.

Order Overruling Petition for New Trial.

Bill of Exceptions and Proof of Service Thereto
Attached. [66]

Assignment of Errors.

Petition for Writ of Error.

Order Allowing Writ of Error.

Bond on Writ of Error.

Order.

Original Writ of Error and Plaintiff's Admission of
Service.

Praecipe for Transcript of Record.

JAMES B. HOWE,

H. S. ELLIOTT,

Attorneys for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

JAMES B. HOWE,

H. S. ELLIOTT,

Attorneys for Defendant.

[Indorsed]: Praecipe for Transcript of Record.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division. November 24,

70 *Puget Sound Traction etc. Company*

1916. Frank L. Crosby, Clerk. By Ed. M. Lakin,
Deputy. [67]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 67 typewritten pages numbered 1 to 67, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing cause, as are necessary to the hearing of said cause on Writ of Error therein the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States

District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [68]

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendant and plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or re- turn, 145 folios at 15c.....	\$21.75
Certificate of Clerk to Transcript of Record—4 folios at 15c.....	.60
Seal to Said Certificate.....	.20
<hr/>	
Total,	\$22.55

I hereby certify that the above cost for preparing and certifying record amounting to \$22.55, has been paid to me by Messrs. James B. Howe, and H. S. Elliott, counsel for defendant and plaintiff in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 28th day of November, 1916.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [69]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Writ of Error.

The President of the United States of America, to
the Honorable the Judges of the District Court
of the United States, for the Western District
of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict which
is in the said District Court before you, or some of
you, between Anna F. Frescoln, the original plain-
tiff and defendant in error, and Puget Sound Trac-
tion, Light & Power Company, a corporation, the
original defendant and plaintiff in error, manifest
error hath happened to the damage of said Puget
Sound Traction, Light & Power Company, plaintiff
in error, as by its complaint appears, we being will-
ing that error, if any hath been, should be duly cor-
rected and full and speedy justice done to the parties
aforesaid in this behalf, do command you, if judg-
ment be therein given, that then, under your seal,
distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit on the 3d day of December, next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [70] to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 3d day of November, in the year of our Lord one thousand nine hundred and sixteen.

[Seal]

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington.

_____,
Deputy.

Allowed by:

_____,
District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington, Northern Division.

Dated November —, 1916.

Received this — day of November, 1916, a true

copy of the foregoing writ of error, for the defendant in error.

Clerk of the District Court of the United States for
the Western District of Washington, Northern
Division.

Deputy. [71]

[Endorsed]: Original. No. 3033. In the District Court of the United States for the Western District of Washington, Northern Division. Anna F. Frescoln, Plaintiff, vs. Puget Sound Traction, Light & Power Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 3, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

Copy of within Writ of Error received and service of the same acknowledged this 4 day of Nov., 1916.

THOS. H. BAIN,
Attorney for Plaintiff,

To Whom it May Concern:

Notice is hereby given that service of all subsequent papers in the within named action except writs and process, may be made upon defendant by serving the same upon James B. Howe and H. S. Elliott as Attorneys for Defendant, at No. 403 Electric Building, Seattle Washington.

Attorneys for Defendant.

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3033.

ANNA F. FRESCOLN,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Citation on Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States of America, to
Anna F. Frescoln, Greeting:

You are cited and admonished to be and appear
in the United States Circuit Court of Appeals for
the Ninth Circuit, at the courtroom of said court, in
the city of San Francisco, in the State of California,
within thirty (30) days after the date of this cita-
tion, pursuant to writ of error filed in the clerk's
office of the District Court of the United States, for
the Western District of Washington, Northern Di-
vision, wherein Puget Sound Traction, Light &
Power Company is plaintiff in error and you are
defendant in error, to show cause, of any there be,
why the judgment in the said writ of error mentioned
should not be corrected and speedy justice should not
be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUG-
LAS WHITE, Chief Justice of the Supreme Court

[Endorsed]: No. 2887. United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. Anna F. Frescoln, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed November 29, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PUGET SOUND TRACTION, LIGHT
& POWER COMPANY, a Corpora-
tion.

Plaintiff in Error,

—vs.—

ANNA F. FRESCOLN,

Defendant in Error.

} No. 2887.

BRIEF OF PLAINTIFF IN ERROR.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

JAMES B. HOWE,
H. S. ELLIOTT,
Attorneys for Plaintiff in Error.

The Seattle Legal News Print

Filed

FEB 7-1917

F. D. Monckton,
Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PUGET SOUND TRACTION, LIGHT
& POWER COMPANY, a Corpora-
tion.

Plaintiff in Error, } No. 2887.

—vs.—

ANNA F. FRESCOLN,

Defendant in Error. }

BRIEF OF PLAINTIFF IN ERROR.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

STATEMENT.

This proceeding for review presents the fol-
lowing question:

Under the statutes of Washington, where
a man receives personal injuries as a result of
the negligent act of another, and during his
lifetime institutes an action to recover there-
for, and upon his death as a result of said
injuries, prior to the final judgment, his wid-

ow revives and prosecutes such action for personal injuries to judgment, does an independent action for wrongful death lie in favor of the widow, or is said action barred by the former recovery?

The following facts are admitted by the pleadings:

On January 22, 1914, one J. W. Frescoln commenced an action in the Superior Court of the State of Washington for King County against the plaintiff in error, to recover \$5,323.00 for personal injuries received on November 22, 1913, while alighting from one of the street cars owned and operated by the plaintiff in error (hereafter called the "defendant"). (Record pp. 10-13.)

The defendant answered denying liability (Record pp. 14-16), and the case was set for trial for October 13, 1914, but, prior to the trial, on September 15, 1914, the said J. W. Frescoln died, and thereafter, on November 27, 1914, the defendant in error, Anna F. Frescoln (hereinafter referred to as the "plaintiff") in her own right and as administratrix of said J. W. Frescoln, was substituted as plaintiff in said action, and on December 7, 1914, the said Anna F. Frescoln individually and as such administratrix, served and filed a sup-

plemental complaint alleging, in addition to the matters set forth in the original complaint, the death of said J. W. Frescoln and the expenses incident thereof, and praying for judgment in the sum of \$20,613. (Record pp. 17-19.)

The defendant answered said supplemental complaint (Record pp. 20, 21) and thereafter said cause came regularly on for trial on March 16, 1915, before a jury, and resulted in a verdict for plaintiff in the sum of \$2,500. (Record p. 8.) The defendant thereafter moved for judgment notwithstanding the verdict, which motion was granted by the trial court on April 5, 1915. (Record pp. 8, 9, 22, 23.) Thereafter plaintiff in said action appealed from said judgment notwithstanding the verdict to the Supreme Court of the State of Washington and on February 29, 1916, the Washington Supreme Court reversed the judgment with directions to the lower court to enter judgment upon the verdict (Record pp. 35-37), and a judgment upon the verdict for \$2,500, interest and costs, was entered by the lower court on April 15, 1916. (Record pp. 37-39.)

Before the said appeal in the former action plaintiff, Anna F. Frescoln, on May 11, 1915, instituted this action in the Superior Court of the

State of Washington for King County, in which she, as the widow of J. W. Frescoln, sought to recover \$25,000 damages for the death of said J. W. Frescoln, it being alleged in the complaint that the death of said J. W. Frescoln on September 15, 1914, was caused by the injury he received while alighting from the defendant's car on November 22, 1913. (Record pp. 1-5.)

The defendant, being a non-resident corporation (Record p. 2), elected to remove said action to the United States District Court for the Western District of Washington, Northern Division, and on June 7, 1915, the record on removal was filed with the clerk of said court. (Record p. 5.) The defendant thereafter answered setting up the former action first instituted by said J. W. Frescoln and the judgment secured therein as a second affirmative defense and plea in bar and making a part of said second affirmative defense copies of the pleadings and judgment for the defendant notwithstanding the verdict (the appeal not having yet been determined) as exhibits attached to said answer. (Record pp. 5-23.)

On July 17, 1915, the plaintiff, Anna F. Frescoln, interposed a motion to strike from said answer the second affirmative defense and plea in

bar for the reason that the same was irrelevant (Record pp. 24, 25), which motion was thereafter denied by the District Court (see opinion of Judge Neterer, Record pp. 26-31).

As already noted, the Washington Supreme Court thereafter reversed the judgment of the lower court in the original action brought by J. W. Frescoln, and on April 15, 1916, in accordance with the direction of the Supreme Court, judgment on the verdict was made and entered in said action, which judgment was thereafter paid and satisfied in full. (Record pp. 36-39.)

On April 24, 1916, the plaintiff in this action, Anna F. Frescoln, upon leave of court (Record p. 34) served and filed herein an amended reply admitting the institution of said action by the said J. W. Frescoln, and all of the proceedings therein as heretofore set out, but alleging the appeal prosecuted in said action, the reversal of the judgment by the Supreme Court and the entry of the judgment upon the verdict, and praying for judgment upon the pleadings. (Record pp. 35-37.) In addition the plaintiff herein made a part of her answer the judgment upon the verdict in the former action. (Record pp. 37-39.)

The issues being made up, this action came regularly on for trial on June 28, 1916, and after the jury was impaneled but before any evidence was introduced, the defendant objected to the introduction of any testimony and moved for judgment in favor of the defendant upon the pleadings for the reason that the pleadings showed that the deceased had instituted an action for the personal injuries he received during his lifetime, which action after his death had been revived and prosecuted to judgment by the plaintiff, Anna F. Frescoln, and said judgment satisfied, both of which motions the court denied. (Record pp. 49-53.) The cause then proceeded to trial, resulting in a verdict for the plaintiff, Anna F. Frescoln, for \$4,500.00 (Record p. 40), and thereafter on July 10, 1916, a decree was entered upon the verdict. (Record pp. 40, 41.)

The defendant petitioned for a new trial upon the grounds urged in this review proceeding, which petition was likewise denied by the lower court on September 21, 1916. (Record pp. 42-48.) From the judgment entered upon the verdict this writ of error is prosecuted. (Record pp. 58-60.)

SPECIFICATIONS OF ERROR.

I.

The court erred in overruling defendant's objection to the introduction of any testimony on the ground that it was admitted by the pleadings that the said J. W. Frescoln during his lifetime had instituted an action for the personal injuries upon which this action is based, which action, upon the death of said J. W. Frescoln, had been revived and prosecuted to judgment by the plaintiff herein. (Record pp. 49-51.)

II.

The court erred in denying defendant's motion for judgment for the defendant on the pleadings on the ground that it was admitted by the pleadings that the said J. W. Frescoln during his lifetime had instituted an action for the personal injuries upon which this action is based, which action, upon the death of said J. W. Frescoln, had been revived and prosecuted to judgment by the plaintiff herein. (Record pp. 51-53.)

III.

The court erred in refusing to instruct the jury to return a verdict for the defendant. (Record p. 53.)

IV.

The court erred in overruling defendant's petition for a new trial. (Record pp. 42-48.)

ARGUMENT.

The specifications of error will be discussed together since they are all based upon the holding by the court below that the prosecution to judgment by the widow and administratrix of the action brought by the deceased in his lifetime, was not a bar to the subsequent action brought by the widow for the wrongful death.

The question presented is one which has never been squarely decided either by the Washington Supreme Court or by the Federal Courts, and is answered by construction to be placed upon Sections 183 and 194 of Rem. & Bal. Code. Section 183 provides:

"The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. *If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within*

the United States at the time of his death, may maintain said action. When the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives, or if deceased leaves no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death, may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, as under all circumstances of the case may to them seem just."

Section 194 provides:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death."

Prior to 1909 the above sections read the same as quoted, omitting, however, the portions in italics. The Legislature of 1909 by separate acts amended these two sections by adding thereto that portion

italicized. (See Laws of Washington 1909, p. 425, Sec. 1; p. 566, Sec. 1.)

Section 183 above quoted, provides for an action for wrongful death, and will hereafter be referred to as the "death act." Section 194 provides for the survival of an action for personal injuries occasioning death, and will be hereafter referred to as the "survival act."

Section 183, the "death act," was first passed in 1854, was amended in 1875, and was made part of the Code of 1881, after which it was not amended until 1909. (See Laws of 1854, p. 220, Sec. 496; Laws of 1875, p. 4, Sec. 4; Code of 1881, Sec. 8.)

Section 194, the "survival act," was first passed in 1854 (Laws of 1854, p. 220, Sec. 485), was embodied in the Code of 1881 (Code of 1881, Sec. 18), and was not thereafter amended until 1909. It will be seen that both of these sections were part of the Code of 1881, and neither was amended from that time until 1909, when the portion italicized was added by amendment.

Before reviewing the decisions of other states we deem it important to examine the Washington cases which tend to throw light upon the construction of these sections.

It will be observed that under the death act the action for wrongful death may be maintained by the "heirs or personal representatives" of the deceased, but it has been uniformly held by the State Court that the word "heirs," as used in this section, is limited to such heirs as are expressly mentioned in the section, such as the widow and children, and does not include the parents or collateral relatives, except as expressly mentioned.

Noble v. Seattle, 19 Wash. 133.

Nesbitt v. R. Co., 22 Wash. 698.

Robinson v. R. Co., 26 Wash. 484.

Copeland v. Seattle, 33 Wash. 415.

Johnson v. S. E. Co., 39 Wash. 211.

Manning v. T. R. & P. Co., 34 Wash. 406.

It has likewise been held that where the action is brought by the personal representatives of the deceased, "it is not for the benefit of the estate but for the sole benefit of the widow and children who share jointly in the damages recovered."

Copeland v. Seattle, 33 Wash. 415.

Koloff v. R. Co., 71 Wash. 543, 549.

An examination of the statutes above quoted will show that the same relatives in whose favor the action for personal injuries causing death may

be revived under the survival act, are made the beneficiaries of an action for wrongful death under the death act. Unlike similar statutes of other states the statutes of Washington do not permit one class of heirs to revive an action for personal injuries and another class to recover for the wrongful death, but the same heirs who are permitted to revive the action for personal injuries are given the fruits of the action for wrongful death. To our mind, this is one of the most convincing indications that the Legislature never intended by these two acts to permit two concurrent actions, one for the personal injuries and one for the wrongful death. So far as we have been able to find, in all of the states where two such concurrent actions are permitted the two actions are maintained in *two different and distinct rights*. The action under the survival statute is brought by the personal representative for the benefit of the estate of the deceased, while the action under the death statute is brought by or for the benefit of the heirs expressly mentioned in the various death statutes of the different states. If one statute made the estate of the deceased the beneficiary, and the other made certain heirs the beneficiary, it might with some reason be urged that the Legislature intended

by the two sections that two concurrent actions might be maintained, the one for the personal injuries, and the other for the death, but that, as we have shown, is not true in this state, and is the vital distinction between the statutes of this state and those of states where two concurrent actions are allowed.

Although the State Court has never squarely decided this point, it has in several cases held it not to be the legislative purpose to permit two independent actions for injuries resulting in death.

Section 717 of the Code of 1881 provided that the personal representatives of a person whose death is caused by the wrongful act of another might maintain an action for his death for damages not to exceed \$5,000, and the amount recovered should be administered as other personal property of the deceased person. Section 8 of the Code of 1881 is the same as Section 183 of Rem. & Bal. Code above quoted, and which was enacted subsequently to said Section 717, and provided, as we have shown, that when the death of a person is caused by the wrongful act of another, his heirs, or personal representatives, may maintain an action for damages against the person causing the death. Here was an instance where one statute

provided for a recovery by the personal representatives for the benefit of the estate, and the other section provided for a recovery for the benefit of the heirs named in the section, as we have shown, and yet it was held in the case of *Graetz v. McKenzie*, 3 Wash. 194, that the two sections were repugnant and that Section 8 (Section 183 above quoted) superseded said Section 717. In so holding the court said:

“Here, then, we have the same persons authorized to maintain two different actions against the same party or parties, for the same wrongful act, in one of which not more than \$5,000 may be recovered, and in the other any amount that may to the jury, under the circumstances, seem just; and in both of which the same parties, the heirs, may be beneficiaries, in whole or in part. If the action be brought under Sec. 8 by the personal representatives, the heirs may be the beneficiaries; if by the heirs themselves, then they certainly are the parties entitled to the amount recovered; and if the action be brought under Sec. 717, and there are no debts, or if the debts do not equal the amount of the recovery, the remainder will go to them by operation of law, as other personal property of the decedent. While we recognize the well established principle of law that repeals by implication are not favored, and that it ought not to be presumed that the legislature intended to place or keep contradictory enactments in the code, or to repeal a law without expressing an intention to do so, we are nevertheless unable, by the application of any of the rules of statutory construction, to reconcile these two sections of the code.”

Again the State Court has repeatedly held that although the action for wrongful death under the death act (Section 183) may be maintained by either the personal representatives, or by the several beneficiaries named in the statute, *yet but one action can be maintained.*

Copeland v. Seattle, 33 Wash. 415.

Riggs v. R. Co., 60 Wash. 292.

Koloff v. R. Co., 71 Wash. 543, 549.

Benson v. Lumber Co., 71 Wash. 616.

In *Copeland v. Seattle*, 33 Wash. 415, 421, the court said:

"It is true, the defendant cannot be subjected to two actions *for the one cause*," etc.

In *Riggs v. R. Co.*, 60 Wash. 292, 294, the court said with respect to Section 183:

"This language indicates an intention to grant one cause of action only, to be prosecuted in a *single proceeding* by the heirs or personal representatives of the deceased. Were we to hold that a separate action could be maintained by each independent heir, such a ruling might, in some instances, result in subjecting the negligent party to a multiplicity of suits for a single wrongful act."

But the state case most nearly in point is that of *Longfellow v. Seattle*, 76 Wash. 509. There the Supreme Court had under consideration the right of the surviving wife of a fireman to cumulative

recoveries under the general death statute above quoted, and Rem. & Bal. Code, Section 8068, providing that whenever any member of the fire department of a city shall lose his life while in the performance of his duty, then, upon satisfactory proof of such facts, the board having charge of such pension fund should pay the surviving widow a monthly pension of one-half the salary of the fireman at the time of his death. The Supreme Court held that these two acts authorize separate and co-extensive but not cumulative recoveries, *since it is the policy of the law not to allow two recoveries for one wrong*, and that hence the acceptance of a pension by the widow precluded any recovery under the general statute for wrongful death. In so holding the court said:

“An examination of the statutes will show that there are deaths from wrongful acts cognizable under the general statutes that are not provided for under the pension act, and that the pension act authorizes the payment of pensions for deaths for which no recovery can be had under the general statute. But in so far as they do coincide, we think they were intended to afford separate and coexistent remedies, *permitting but one recovery for the one death rather than cumulative recoveries*. It will be remembered that no action lay to recover for the death of another at the common law, but that the right is wholly statutory. It will be remembered, also, that in this state exemplary or punitive damages are not recoverable

unless expressly so provided by statute, and that neither of these statutes provide for exemplary or punitive damages. The purpose of the statutes, then, is compensation for the wrong suffered. They are wholly remedial, and *since it is not the policy of the law to compensate twice for the same wrong, we think it must follow that the acceptance of the benefits provided by the one is a bar to the pursuit of the other.*"

* * * * *

"For authority on the proposition that the adoption of one remedy by a person having a choice of remedies bars the right to invoke another, we need not look beyond our own cases. It was so held in *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208; *Gaffney v. McGrath*, 23 Wash. 456, 39 Pac. 973; *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713; *Gabrielson v. Hague Box & Lum. Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032, and in *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177."

Precisely the same rule should apply in the case at bar. Note the language of the court: "It is not the policy of the law to compensate twice for the same wrong," etc. Does not the same reasoning apply to the case at bar? Can it be the policy of the law that the heirs of the deceased should recover full compensation for the injury received by the deceased, and that in a second action the same heirs be permitted to recover full compensation for the death of the injured party? To permit two recoveries would be not only to permit two actions by the same plaintiffs growing out

of the same wrong, but would be to permit the assessment of damages twice against the same defendant for the same wrongful act. Clearly this is not contemplated by the statute.

“The proposition relied on by the defendants in error, if correct, exactly doubles the operation of a statute which has already gone a bowshot beyond that of any other state; for it is claimed that this act gives the widow the full value of the life of the husband, even though he in his lifetime had received from the defendant compensation for the injury inflicted, and that evidence of the release cannot be introduced, either as a bar to her recovery, or to be considered by the jury in reducing the amount of the verdict. A decision which would announce, to persons who have settled with parties injured, that the settlement, instead of being in full, was only partial; that, if death ensues as a result of the injury, they must pay again, and this time the full value of the life of the deceased,—will be justly regarded as a great hardship, and it will come to the widow and children, not as the grant of a right heretofore unjustly withheld, but as a second payment of a claim already satisfied.”

Southern Bell Tel. & Tel. Co. v. Cassin,
111 Ga. 575, 36 S. E. 881.

The question presented in the above case was whether an action for wrongful death existed when the deceased, during his lifetime, had compromised the claim for the injuries from which he died, but the principle, we submit, is the same. The Cassin

case was followed by the State Supreme Court in *Brodie v. Washington Water Power Co.*, 92 Wash. —, 159 Pac. 791.

It will be urged, however, that concurrent actions should be allowed because the elements of damage in the two actions are not exactly the same, and it will be claimed here as it was claimed in the lower court, that in the action for personal injuries the widow could only recover for the pain and suffering and expenses incident to the personal injuries, while in the action for wrongful death she should be allowed to recover for the value of the life of the deceased. But there is nothing in the survival act that so limits the amount of recovery. The statute contains positively no limitation whatsoever as to the elements of damage for which recovery may be had. For the court to confine such recovery to the pain and suffering sustained by the deceased would be, not statutory construction, but judicial legislation. Where the deceased prosecutes the action to judgment in his lifetime he recovers the full amount of his damages growing out of such injuries including pain and suffering, impairment of earning capacity, and the expenses incurred, and there is nothing in the survival act in the remotest degree indicating that

the beneficiaries mentioned in the statute cannot recover the full amount that deceased could have claimed had he himself brought the action in his lifetime. This being true, it is apparent that under the survival act the beneficiaries recover precisely the same items of damage as they are allowed to recover under the death act. As an extreme case, let us suppose as a result of a personal injury sustained a man 30 years of age and earning \$100 a month loses both arms and both legs but nevertheless survives his injuries for the period of a year and then dies. It is clear that if he brought an action during his lifetime he would, if the defendant were liable, be entitled to recover for his pain and suffering, the expenses incurred and for the total loss of his earning capacity during his life expectancy of 35 years. If he instituted an action for his personal injuries in his lifetime and died during the pendency of such action, and such action were revived and prosecuted to final judgment by his widow, clearly under the survival statute (Section 194) the widow would be entitled to recover precisely what damages the deceased would have been entitled to recover in his lifetime.

But let us suppose that the widow and minor children instead of reviving the cause of action

of the deceased, sue for the wrongful death under the death act. What is the measure of their damages? It is the value of the life of the husband and father, and *this is determined by the wage-earning power of the deceased at the time of his injury and during his life expectancy*. Damages by way of solace to the affections of the wife or children are not allowed.

Walker v. McNeil, 17 Wash. 582.

It may be urged that there is an added element of damage,—the loss of protection, intellectual and moral culture in the case of minor children, but this, if in fact an element of damage, is more than offset by taking into consideration the inroads made upon the income of the deceased had he lived, for his own support and maintenance during his life expectancy, for it must be apparent that where the widow and children are permitted under the survival act to recover for the loss of the earning power of the deceased during his life expectancy, this would amount to far more than the pecuniary loss to the widow and children of the deceased as a bread-winner where the personal expenses of the deceased during his life expectancy are deducted. A man might earn \$100 a month and spend \$50, leaving a net loss to the persons

dependent upon him for their support of \$50 a month, whereas if the widow under the survival act recovered the full amount of the damage to the deceased for his lost earning capacity she would recover the full amount of \$100 a month during his life expectancy, or double the amount she could recover under the death act for loss of his support.

In this connection the following question is at once suggested: If the Legislature contemplated a recovery under both the death act and the survival act was it intended that the beneficiary should recover for the value of the life of deceased after the injury, or was it intended that recovery should be had for the value of the life of the deceased before he was injured? Unless the Legislature intended by the two statutes to allow the recovery of double damages for the same injuries by the same heirs we must conclude that if an action for wrongful death is allowed in addition to the action for personal injuries under the survival act, then the beneficiary in the second action could recover only for the value of the life of the deceased *after having sustained the injuries from which he died*. It must be apparent that to permit such a recovery would be to permit no recovery at all, for the

beneficiaries could not recover under the survival statute unless the personal injury sustained by the deceased was the cause of his death, and if such injuries were sufficiently grievous to cause his death, it is apparent that after the injuries were sustained his earning capacity would be destroyed and his death would result in no loss of support to his dependents. Instead of being a bread-winner he would be a positive burden. To revert to the former illustration,—of what value could the life of a man who has lost both arms and both legs be to the surviving wife and children? It is apparent that his death would be a blessing rather than a loss.

I an action under the survival act such damages can be recovered as the deceased could have recovered at any time before his death.

Brodie v. Washington Water Power Co., 92 Wash. —, 159 Pac. 791.

That such damages were not confined to the pain and suffering sustained by the deceased was recognized in *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 97, where the court in passing upon a claim of an excessive verdict in such a case apparently took into consideration the earning capacity of the deceased at the time of his injury.

Plaintiff can scarcely be heard to urge that it was not her purpose in the first action to recover the full amount of damages that the deceased could have recovered in his lifetime. In the action which he brought deceased asked for damages in the sum of \$5,323.00. (Record p. 15.) After his death plaintiff in her supplemental complaint in said action demanded judgment for \$20,613.00 (Record p. 19), nearly four times as much as the judgment prayed for by the deceased for the same injuries,—inconsistent, we say, with the theory that it was not the purpose of plaintiff in that action to recover the full amount of the damages sustained by the deceased.

While, as we have said, the State Court has never decided the precise question presented here it has very recently held that the right of the widow and children to maintain an action for the wrongful death caused by a personal injury is barred by a release and satisfaction given by the person injured during his lifetime.

Brodie v. Washington Water Power Co.,
92 Wash. —, 159 Pac. 791.

The foregoing decision is in harmony with the great weight of authority, and to our mind,

should be decisive of the case at bar. The theory upon which it is urged that the heirs may maintain concurrent actions under the survival and death statutes is that the action for wrongful death is purely statutory, and is a new cause of action which springs into being upon the death of the injured party in favor of the beneficiaries named in the statute, and is wholly independent of the right of action of the deceased which survives in favor of the heirs. But if the cause of action for the wrongful death is barred by a settlement made by the deceased in his lifetime, does it not necessarily follow, where the cause of action of the deceased for personal injuries is prosecuted to judgment by the surviving heirs and such cause of action thereby merged in, and wiped out by the judgment, that such judgment must necessarily be a bar to the action for wrongful death under the death statute?

In the Brodie case (92 Wash. —, 159 Pac. 791), the State Court, as we have said, held that a release given by the deceased during his lifetime was a bar to a recovery for his wrongful death. In so holding the court said:

“The arguments for and against the proposition, with a collation of the authorities, will be found in the opinions of the court and in the opin-

ions of the dissenting judges in the cases of *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694, and *Rowe v. Richards*, 35 S. D. 201, 151 N. W. 1001, L. R. A. 1915E, 1075, the first of which maintains and the second of which denies the rule.

“It is the opinion of the majority of this court that the better reason is with the cases holding with the affirmative. This view requires an affirmance of the judgment of the court below; and it is so ordered.”

Thus the Washington Supreme Court adopts as its own, the dissenting opinions in *Rowe v. Richards*, 135 S. D. 301, 151 N. W. 1001. The following is quoted from dissenting opinion of Judge Smith:

“It seems to me that a good many decisions of other courts, as well as the majority opinion of this case, present a somewhat confused interpretation of these statutes, which were enacted only for one distinct purpose, viz., that of abrogating two rules which became incorporated in the ancient common law: First, ‘that the death of a human being cannot be complained of as a civil injury for which damages are recoverable in a court of law;’ and, second, ‘that a right or cause of action which belonged to an injured person while living is extinguished by his death.’ Denunciation of these ancient rules may add somewhat to our appreciation of our own modern wisdom, but it serves no real purpose in the discussion of these statutes. Those rules, however, must necessarily be considered in the interpretation of these statutes, and the objects

sought to be accomplished by their enactment. The character and effect of particular statutory changes in the common-law rules referred to in our own state, and in other states, should be our guide in the interpretation of such statutes. It seems to me that nearly all the fallacies of reasoning and conflicting views found in the decided cases arise from a total or partial misconception of the real purpose of this class of legislation. It was not its purpose to enlarge or change any existing law which made it the duty of the husband to support the wife, nor to change the law which gave her the legal right to demand support from him. It was not intended in any degree to change or limit the husband's control during his lifetime of property or choses in action which might ultimately be devoted to her support. It was intended only to secure to her that which, under common-law rules, she would have lost upon the happening of his death. The statutes, I think, should be construed as many courts have construed them, merely as intended to authorize a recovery of damages after the death of the husband for a previously uncompensated injury to the husband's earning capacity. It must be conceded that the reasoning and logic in many of the decided cases is unsatisfactory, and subject to criticism. This, I think, is due largely to a misconception of what constitutes the cause of action, and because, as said by Justice Whiting, some courts have failed 'to distinguish between a cause of action and one single element of such cause of action.' All of these statutes, however, no matter what their phraseology, were primarily intended to accomplish a single purpose—the abrogation of the common-law rules which inhibited a civil remedy in damages for a wrongful death, or for personal injuries which later result in death. They all deal with conditions which arise after the death of the person injured. The right

of action, under all statutes, must therefore necessarily be vested in a third person, either the personal representative for the benefit of the estate, or for the benefit of particular persons named in the statute, or given to particular beneficiaries, such as the wife or children."

* * * * *

"No one doubts a single wrongful act may result in separate and distinct injuries to two or more separate and distinct persons or rights, and that either of such injured persons may maintain an action for his own distinct damage. Nor will any one deny the power of the Legislature to split the total aggregate damages resulting from a wrongful injury to the husband by giving a part to the estate and a part to the wife. *But I think no one will assert that legislative power exists to require the wrongdoer, first, to pay the total aggregate damages to the estate, and, again, to pay the total aggregate damages to the wife. The controlling principle is that, when the wrongdoer has once paid the agreed, or legally ascertained, total damages, to the person entitled to receive the same, at the time such payment is made the original wrongful act is fully satisfied and the right of action therefor extinguished.*"

* * * * *

"Some courts have viewed this rule of damages as a 'new cause of action' created by statute. No wonder, when one court insists that these acts are survival statutes, and another that a rule of damages creates a new 'cause of action' never heard of before, that there should be conflict of decision, lame reasoning, hair-splitting distinctions, profound and abstruse definitions of terms, and almost hopeless confusion. And this in face of the fact quite universally conceded by the courts that the Lord Campbell Act was conceived and enacted only because of, and to abrogate, the two common-

law rules referred to above, as is shown by the criticism of those ancient rules in the majority opinion, and in the elaborate quotations from certain courts. The fact is that these statutes were enacted for only one purpose, and were not intended or designed to change any right of the husband to deal in his lifetime with his property or choses in action, no matter in what way or to what extent his exercise of that right might affect the wife's means of support or the value of his estate."

The following is also quoted from the dissenting opinion of Judge Gates:

"It is not the death which is the cause of action, but it is the negligence which caused the death that is the cause of action, and the death is material only as it relates to the damages which may be recovered. Cooley on Torts (2d Ed.) 309."

* * * * *

"I think we erred in the former decision in this case (32 S. D. 66, 142 N. W. 664) when we said that there were two causes of action, and that 'neither is the prosecution or satisfaction of either a bar to the prosecution and recovery on the other.' That error ought now to be corrected."

These dissenting opinions having been adopted by reference by the State Court, there can be no doubt as to the decision of that Court when called upon to decide the question raised by this appeal.

According to the learned opinions quoted the death and survival acts were enacted for the single purpose of correcting the injustice done by the common-law in not permitting those dependent upon

the deceased for their support to recover either for his injuries or for his death. The fact that the Legislature deemed it proper to abrogate these two common-law rules by two separate sections instead of one does not mean that it was intended in an action for the injuries themselves, to require the wrongdoer to pay the total aggregate damages, and in another action by the same heirs to require him again to pay the total damages sustained. That such was not the legislative intent was decided in *Longfellow v. Seattle* 76 Wash. 509, (previously cited) holding that where two statutes permitted a recovery for death, a recovery under one statute barred a recovery under the other, on the principle that the adoption of one remedy by a person having a choice of remedies bars the right to invoke the other.

It is held with apparent unanimity that where the deceased has prosecuted to judgment in an action for her personal injuries in his lifetime, such judgment is a bar to an action brought thereafter by the statutory beneficiaries to recover for his wrongful death.

Kling v. Torello, 87 Conn. 301, 87 Alt. 987.

Hecht v. R. Co., 132 Ind. 507, 32 N. E. 302.

Dougherty v. New Orleans, etc. Co., 132 La. 993, 63 So. 493.

Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851.

Littlewood v. N. Y., 89 N. Y. 24.

Legg v. Britton, 64 Vt., 652, 24 Alt. 1016.

Perry v. R. Co., 1 Boyce (Del.) 399, 77 Alt. 725.

Reed v. R. Co., 37 So. Carolina, 42, 16 S. E. 289.

Edwards v. Interstate Chemical Corp., —

N. Carolina —, 87, S. E. 635, and many other cases that might be cited.

We quote the following from *Hecht v. R. Co.*, 132 Ind. 507, 32 N. E. 302, 303:

“In such an action the injured party is entitled to recover full compensation for all the injuries which were the natural consequence of the wrongful act. It was certainly not the intention of the legislature that when the person guilty of the wrong has been once subjected to a suit by the injured party in his lifetime, and compelled to pay all of the damages resulting from the injuries sustained by the wrongful act, he should again be liable to an action in favor of the personal representatives of the injured party after his death, and be again compelled to respond in damages for the same act.”

Bearing in mind that the purpose of the survival statute was to give to dependent heirs the

remedy which the deceased himself had during his lifetime, the same rule should apply whether the action for personal injuries was prosecuted to judgment by the deceased in his lifetime or by the statutory beneficiaries after his death.

We will now examine the authorities from other states in which the question involved in this appeal is directly considered. In the case note published in 8 L. R. A., New Series, p. 365, the learned author says:

“The weight of authority, based on reasons which are irreconcilable, holds that a recovery of a judgment in one of these actions will bar a recovery under the other.”

In *Perry v. R. Co.*, 1 Boyce (Del.) 399, 77 Alt. 725, 734, the court after an extended review of the authorities, concludes:

“Whether recoveries may be had under both the survival and death provisions of the statute for a single act of violence or negligence, the American decisions, as we have indicated, are in conflict. *The decisive weight of authority is to the effect that the Legislature never intended to allow two actions for the same injury.*”

This is true in face of the fact that in most if not all of the states having both a survival statute and a death statute the action for personal injuries can be brought only by the personal representative

for the benefit of the estate, while the action for wrongful death can be prosecuted only by, or for the benefit of the next of kin. As indicated by the author first above quoted, the reasons given by the courts for their decision are irreconcilable, yet the majority for one reason or another make an effort to avoid the injustice which would necessarily result from permitting the personal representative to recover for damages for the personal injuries, and later permitting the heirs to recover the total aggregate damages resulting in the death.

PENNSYLVANIA.

In Pennsylvania there is a survival statute in favor of the personal representatives, while in another section giving certain heirs a right of action for wrongful death caused by the negligence of another, where no suit has been brought by the injured party in his lifetime. Under these statutes it has been held in that state that two actions can not be maintained, the one for personal injuries and the other for wrongful death.

McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339, 44 Alt., 435.

Edwards v. Gimbel, 202 Pa. 30, 51 Alt. 357.

In the McCafferty case first above cited, the court said:

“The action was commenced by the deceased six months before his death, and after his death it was carried on by his mother, who, as administratrix of his estate, had been substituted as plaintiff. This was done under the eighteenth section of the act of April 15, 1851, which gives to a common-law action the quality of survivorship. The nineteenth section of the same act creates a new right of action, unknown to the common law, and limited to cases where death has resulted from violence or negligence, and no suit has been brought by the injured party in his lifetime. The act of April 26, 1855, designates the persons who may exercise the right conferred by the nineteenth section of the act of 1851. *Railroad Co. v. Decker*, 84 Pa. St. 419; *Birch v. Railway Co.*, 165 Pa. St. 339, 30 Alt. 826. Under these acts two actions cannot be sustained for the same injury. *If the party injured has brought an action and died, it may be continued by his executor or administrator for the benefit of his estate, but in such a case no new action can be brought under section 19.* If he has not brought an action, the parties designated by the act of 1855 may do so, and the recovery is in their right. *Taylor’s Estate*, 179 Pa. St. 254, 36 Alt. 230; *Maher v. Traction Co.*, 181 Pa. St. 617, 37 Alt. 571. If the action is continued for the benefit of the estate, the measure of damages is the loss sustained by the injured party. In the opinion in *Maher v. Traction Co.*, *supra*, it was said by the present chief justice: ‘*As the action has been brought in the lifetime of the injured party, and had survived by virtue of section 18 of the act of 1851, it logically follows that the damages recovered by her personal representatives should be the same as she could have recovered had death*

not ensued. Included therein are damages for her pain and suffering up to the time of her death, and diminution of earning power during a period of life which she would have probably lived had the accident not happened. It is a mistake to suppose that the recovery in this case is for the death. It is still for the personal injury.' "

The foregoing opinion is quoted from so extensively for the reason that it points out so clearly that the damages recoverable under the survival statute are identical with those recoverable in a proper action under the death statute.

MICHIGAN

Michigan also has a survival act which provides that a cause of action for negligent injuries to a person shall survive, as well as a death act providing that whenever the death of a person shall be caused by the wrongful act of another, the person causing the death shall be liable to an action for damages in favor of the personal representatives of the deceased for the benefit of the widow or next of kin. The proceeds of the action under the survival statute go to the estate. The proceeds under the action for wrongful death go to the personal representatives for the benefit, as we have shown, of the widow or next of kin.

Under these statutes it is held in that state that a recovery cannot be had both for personal injuries and the wrongful death in two separate actions, but that where the death is instantaneous the only right of action is under the death act, while where the deceased survives for a period of time after being injured, the only recovery that can be had is under the survival statute.

Sweetland v. R. Co., 117 Mich. 329, 75 N. W. 1066.

Dolson v. Ry. Co., 128 Mich. 444, 87 N. W. 629.

Storie v. Elevator Co., 134 Mich. 297, 96 N. W. 569.

Rouse v. R. Co., 164 Mich. 475, 129 N. W. 719.

We beg leave to quote the following from the opinion of Chief Justice Long in the Sweetland case above cited, which is peculiarly applicable to the case at bar in view of the holding of the Washington Supreme Court that a release in the lifetime of the deceased is a bar to an action for wrongful death:

“Was it the intention of the legislature under section 7397 to give a right of action for the benefit of the estate in case of death from an injury, and also to allow the heirs to recover under sections 8313 and 8314 for their pecuniary loss?

I think not. The fact that the common-law right of action which survives under section 7397 is for the benefit of the decedent's estate, and that the right of action under sections 8313 and 8314 is given for the benefit of the decedent's heirs, can make no difference in the construction which I think must be placed upon these statutes. It was not the intention of the legislature to give two rights of recovery for the same injury which results in death. The act giving a right of action for damages for wrongful death was passed by our legislature several years after the act providing for survival actions, and was intended to provide the only remedy where death resulted from any wrongful act. If Mrs. Aldrich, the decedent, had lived long enough to bring suit against defendant for injuries, etc., and pain and suffering, both past and future, and the jury had awarded her damages, which had been paid, and then she had died from the same injuries so wrongfully inflicted, would it be held that the administrator might maintain another action under sections 8313 and 8314? Or, had she survived her injuries long enough to have settled with the defendant, and had so settled, would it be held that the administrator could maintain an action under these sections? *It is generally held that if the deceased had settled for injuries received in his lifetime, or recovered damages in an action, an action cannot be maintained, under Lord Campbell's act, after his death. Cooley, Torts, 309. It must follow, therefore, that if such judgment obtained by her in her lifetime or settlement so made by her is a bar to a recovery by the heirs under sections 8313 and 8314, then a judgment obtained by the heirs for a cause of action accruing to them by survival under section 7397 would be a bar to the right to recovery for her death under sections 8313 and 8314."*

MAINE.

In that State the survival statute provides that if a person is injured through the negligence of another and afterwards dies, redress can be obtained by his personal representative. Another statute permits a recovery for death by wrongful act, in the names of the personal representatives of the deceased person, the amount recovered to be for the exclusive benefit of the decedent's widow and children.

In *Sawyer v. Perry*, 88 Me. 42, 33 Alt. 660, the court held that these acts did not give two actions for a single injury, one for the benefit of the decedent's estate and another for the benefit of the widow and children, or next of kin, but that the death statute applied only where the death was instantaneous. In so holding the court said:

"So, in this case, *We cannot believe that the legislature intended by the act of 1891, c. 124, to give two actions for the single injury,—one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin.* We think the legislative intention was to extend means of redress to a class of cases where none before existed. This class of cases was still large. There still existed a large class of cases in which redress for injuries resulting in immediate death could not be had. And we cannot resist the conviction that it was the intention of the Legislature

to provide means of redress for this class of cases, and not to duplicate the wrong-doer's liability, and subject him to two actions for a single injury. Previous statutes of a similar character having been so interpreted, we cannot resist the conviction that the Legislature expected and intended that this statute should receive the same interpretation. Our conclusion, therefore, is that the act of 1891, c. 124, applies only to cases in which the persons injured die immediately."

In some of the states which have both survival statutes and death statutes, the courts in order to construe these two sections so as not to permit a recovery under each for the same injury, have held that the survival act is applicable only in cases where death results from some other cause than the injury and that if death results from such injury the personal action does not survive and the only right of action in such event is under the death act for the benefit of the heirs. It is so held in

ILLINOIS

Hulton v. Dally, 106 Ill. 131.

Bruns v. Welte, 126 Ill. App. 541.

Chicago Etc. R. Co. v. O'Conner, 119 Ill. 586, 9 N. E. 263.

RHODE ISLAND

The right to a double recovery is denied for the same reason in this state.

Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. 205.

KANSAS

The same rule obtains here.

McCarthy v. R. Co., 18 Kan. 46.

Hulbert v. Topeka, 34 Fed. 510 (construing Kansas statute).

MISSISSIPPI

It has been held under the statutes of this state that but one recovery for a wrongful act resulting in death can be had, and that where the widow of the decedent sues to recover damages suffered by herself and minor children for the death of her husband, she cannot thereafter sue as her husband's testatrix to recover damages sustained by the decedent himself.

Mobile Etc. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360.

NORTH CAROLINA

Here the survival statute provides in effect that causes of action for personal injuries do not survive to the personal representatives unless such injuries shall cause the death of the injured party. The death statute gives an action to the adminis-

trator for wrongful death. Under these sections it is held that where death results from personal injuries, the right of action for the personal injuries which the deceased had prior to his death merges into the cause of action for the death which then becomes the only available remedy.

Bolick v. Ry. Co., 138 N. C. 370, 50 S. E. 689.

VERMONT

The statutes of Vermont with respect to the survival of actions for personal injuries and actions for wrongful death, are substantially the same as those of Washington, with the exception that the revived action for the personal injuries is prosecuted by the personal representatives of the deceased, while the recovery under the death act is for the benefit of the widow or next of kin. Under these statutes it was held in a long and well considered case that where a plaintiff in an action for personal injuries died from such injuries pending the action, and his administrator recovered judgment therein under the survival act, such judgment was a bar to an action by the administrator for the benefit of the widow or next of kin under the death act.

Legg v. Britton, 64 Vt. 652, 24 Atl. 1016.

KENTUCKY

In speaking of the survival and death statutes of the State of Washington, the Washington Court said in *Noble v. Seattle*, 19 Wash. 133, 135:

“There is a greater similarity between these provisions of our own statute and those of the State of Kentucky relating to the same subject than we have been able to find elsewhere.”

A comparison of the Kentucky and Washington statutes bears out this finding of the court. The constitution of Kentucky provides that when the death of a person shall result from an injury inflicted by a wrongful act, damages may be recovered therefor, the action, until otherwise provided by law, to be prosecuted by the personal representative of the decedent, and the Kentucky statutes, Section 6, passed in pursuance of such constitutional provision, provided that the proceeds of such action should be for the benefit of and go to the kindred of the deceased in the order specified in the statute. This is the death act.

The survival act (Kentucky statute, Section 10) provides that the cause of action for personal injuries causing physical and mental suffering does not abate on the death of the injured person, and the courts of Kentucky have held that under this survival statute an action begun by

the deceased during his lifetime, for personal injuries sustained, may be revived and prosecuted to judgment by his personal representatives after his death. Under these statutes and similar earlier statutes it has uniformly been held in a long line of decisions by the courts of Kentucky that where the deceased instituted an action in his lifetime for personal injuries sustained, which was revived and prosecuted to judgment by his personal representatives, such an action was a bar to an action brought by the personal representatives to recover for his wrongful death.

Hansford v. Payne, 11 Bush. 385.

Conner v. Paul, 12 Bush. 144.

Donohue v. Drexler, 82 Ky. 157.

Hacket v. R. Co., 95 Ky. 236, 24 S. W. 871.

Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 S. W. 236.

Owensboro & N. R. Co. v. Barclay's Adm'r., 102 Ky. 16, 43 S. W. 177.

Lewis v. Taylor Coal Co., 112 Ky. 845, 66 S. W. 1045.

Bowling Green Gas Light Co. v. Deane, 142 Ky. 678, 134 S. W. 1115.

Chesapeake v. Ohio R. Co. v. Banks' Adm'r., 142 Ky. 746, 135 S. W. 285.

We beg leave to quote the following excerpts from a few of the Kentucky decisions:

“Now, this court has decided, and settled the question, that, where certain acts cause death, they cannot be divided so as to make two actions,—one to recover for the suffering caused, and the other to recover for death. The party must elect. See *Conner’s Adm’x. v. Paul*, 12 Bush, 147.”

Hacket v. R. Co., 95 Ky. 236, 24 S. W. 871.

Owensboro & N. R. Co. v. Barclay’s Adm’r.,
102 Ky. 16, 43 S. W. 177.

“The acts causing the death of the party, from either the willful or ordinary negligence of the party charged, constitute but one cause of action, whether the measure of recovery sought is for the suffering of the intestate during his life or for the willful negligence causing his death. Different degrees of negligence cannot be established from the same acts of the party charged, so as to create different causes of action in favor of the party injured, or the injuries resulting from such negligence so severed as to create distinct causes of action by the same person. The statute has only enlarged the remedy, and given to parties a cause of action unknown to the common law. The party entitled to bring the action, either at common law or under the statute, must make his election; and, while the right of recovery under our statute for willful negligence may increase the measure of recovery, such an action is a bar to a cause of action that survived at common law upon the same facts. The acts constituting the wrong being inseparable, a recovery by the administrator for the mental and bodily suffering of the intestate is a bar to any proceeding under the statute, either by the personal representative or the next of kin.’ This rule has been repeatedly followed and is now the well-settled law in this state. Where one is

injured through the negligent act of another, and death does not immediately ensue, the representatives of the deceased may, at their election, sue either for the pain and suffering endured by the deceased as a result of the injury, or for his death."

Conner's Adm'r. v. Paul, 75 Ky. 144.

Chesapeake v. Ohio R. Co. v. Banks' Adm'r.,
142 Ky. 746, 135 S. W. 285, 288.

"There can be no substantial distinction between acts done by the decedent at the time of the injury or after the injury as affecting the right of his personal representative to recover where such acts on his part would bar him from recovering.

"The rule that a personal representative cannot sue upon both causes of action is based upon the ground that the defendant committed a single wrong, the negligence or wrongful act which caused the injury, and that, while the law gives two remedies for the wrong, it was not contemplated that two recoveries should be had for one wrong. The plain purpose of the act of 1854 was simply to do away with the common-law holding that no recovery could be had when death resulted immediately. The cause of action by that act was vested in the personal representative, and it was manifestly intended only to give him a remedy in cases where before there had been no remedy."

* * * * *

"When the Legislature passed this statute, this court had several times held that the personal representative could not sue upon both causes of action, and if the Legislature had contemplated changing that rule, and allowing two actions to be maintained for one injury, it must be presumed it would have clearly so declared; for *it has long been*

a rule of the common law to allow only one recovery for one wrong, although several different remedies may be provided. If notwithstanding his settlement the representative of the decedent may recover in this action, he might equally recover if the decedent had brought a suit and recovered a large sum for his injury before his death."

Louisville Ry. Co. v. Raymond's Adm'r., 135 Ky. 738, 123 S. W. 281.

VIRGINIA

The Virginia death act provides for the recovery for wrongful death by the personal representative for the benefit of the wife or other relatives named therein. The survival act provides in effect that an action for personal injuries shall not determine or abate by the death of the injured party, but that the same may be revived in the name of his personal representative.

In *Brammer's Adm'r. v. Norfolk & W. Ry. Co.*, 107 Va. 206, 57 S. E. 593, the Supreme Court of Virginia held that where a party injured brought suit therefor, and died prior to its termination from his injuries, whereupon his administrator revived the action and prosecuted the same to judgment, the judgment was conclusive against the administrator's right to maintain a subsequent action for wrongful death. In so holding the court said:

“As suggested by counsel for defendant in error, *if this action could be maintained, it could also be maintained, although Brammer in his lifetime by compromise or by recovery in an action for his injuries had been compensated therefor.*

“We are wholly unable to see anything in the provisions of the statute to warrant the conclusion that by it two actions against the same defendant for the same injuries are authorized, so as to give an action in favor of the administrator representing the estate and also a second action in favor of the administrator representing the wife or children, or other beneficiary mentioned in the act.

“In 13 Cyc. 327, citing a number of authorities, it is said: ‘While the authorities are by no means unanimous upon the point, the better doctrine seems to be that, where one in his lifetime recovers damages for personal injuries caused by negligence, and death subsequently results therefrom, his personal representatives or beneficiaries designated in the statute are barred from recovery under a statute giving them a right of action for death by wrongful act.’ And further: ‘Likewise, where the plaintiff in an action for personal injuries dies from such injuries pending the action, and his administrator recovers judgment therein, such judgment is a bar to an action by the administrator or the beneficiaries for the death by wrongful act.’ In support of this last quotation, there are also a number of authorities cited.

“There is a great weight of authority for the proposition that a judgment for damages for personal injury by the wrongful act or neglect of another, or where the injured party has received satisfaction in his lifetime for the injuries he sustained, is a bar to the action under the statute by the personal representative for damages by reason of

the plaintiff's subsequent death. The real question here is whether a judgment against the plaintiff in error, the administrator of Brammer, based on the finding of the court on the same issue of fact and law presented to it, is a bar to a subsequent action involving the same cause of action.

"In our view of the statute we are considering but one action can be maintained to recover damages for injury to a person caused by wrongful act, neglect, or default of another person or corporation, as there is but one cause of action in such a case, and whether that action be brought by the injured party in his lifetime and revived after his death during the pendency of the action in the name of his personal representative, or a new action be brought within the statutory period, as provided in the statute, but one recovery can be had, and that for the benefit of the next of kin nominated in the statute where they exist, as in this case. Therefore, if there be a recovery in the action revived, or it be adjudicated in that action that the injured party had no right of action at his death, it is conclusive of the right to maintain another action to recover damages for the same injury."

It is to be especially noted that the Brammer case was followed by Judge Neterer in his decision in the court below on plaintiff's motion to strike the second affirmative defense.

Frescoln v. P. S. T., L. & P. Co., 225 Fed.
411.

Record, pp. 26-31.

It would seem that this decision should have carried at least some weight with the court in its decision of the question raised by this appeal.

UNITED STATES.

Before the amendment of 1910 of the Federal Employer's Liability Act, the right of recovery given to an injured employee was extinguished by the employee's death.

Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59.

But in 1910, Congress added another section to the act of 1908, providing that any right of action given by said Act to a person suffering injury should survive to his personal representative for the benefit of the surviving widow, etc., "but in such cases there shall be only one recovery for the same injury."

U. S. Comp. St. 1913, § 8665.

Whether under this amendment two concurrent actions are permitted, one for the personal injuries and the other for the wrongful death, has never been passed upon by the Federal Courts, but the one State case that has as yet construed this act as amended—*Louisville & N. R. Co. v. Rhoda*, — Florida —, 71 So. 369,—holds that under the

1910 amendment the administrator had the option to sue for the injury resulting in the death, or to sue for the wrongful death itself, but could not sue for both. In so holding the court said:

“The court further charged the jury that the measure of damages, if the plaintiff recovered, would be the loss to the estate of the intestate, caused by the injury resulting in his death; that is, the amount he would probably have accumulated, reduced to its present money value. We find no fault in this. Under the amendment, as we construe it, without enlightenment on the subject from the final arbiter, the federal Supreme Court, *the administrator, in bringing the action, has the option to seek recovery either for the loss to the estate, as was here done, or for the loss to the beneficiary, the recovery in either case being for the latter's benefit, but he cannot recover for both losses.* If the liability of the intestate towards his parents indicated that their loss would probably be greater than the accumulations for himself, the administrator, suing for their benefit, might, upon proper declaration of these facts, recover the larger amount; on the other hand, if nothing or little was contributed to the beneficiaries under the statute, the administrator could recover the larger amount by using under the survivorship amendment.”

Although, as we have heretofore pointed out, no Federal Court, so far as we can find, has ever been called upon to decide the exact question raised by this appeal, they have held that release given in the lifetime of the deceased for the personal injuries which resulted in his death consti-

tutes a complete bar to an action for wrongful death subsequently brought.

Lindsay v. R. Co. (C. C. A.) 226 Fed. 23.

N. P. Ry. Co. v. Adams, 192 U. S. 440.

As we have already urged, if a release given in the lifetime of the deceased is a bar to an action under the death statute then an action for the personal injuries sustained by the deceased in his lifetime and prosecuted to judgment by his personal representative under the survival act, should likewise be a bar to an action under the death statute.

There is one other consideration that should not be overlooked,—the very fact that neither the State nor the Federal Courts have ever been called upon to decide the question raised by this appeal, although these same laws have been upon the statute books since 1854, indicates clearly that it has been the common opinion of the bar that two concurrent actions could not be waged to final judgment in an action of this kind, and that a judgment in one action would be a bar to the other. We do not recall a single instance, prior to the one involved in this appeal, where two such suits have been brought.

"A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible. The measure of pain and suffering, or estimated damage to one's estate, cannot be so definitely marked as to limit liberality of a sympathetic jury.

"One more consideration may be noted. While a court may not be justified in resting a decision upon a common opinion of the bar, yet such an opinion, held and acted upon for a long time, furnishes a strong presumption that a decision in accordance therewith is correct. *We think that the common understanding has been that two actions could not be maintained. The memory of the members of this division, covering a period of more than 30 years at the bar and on the bench, does not recall an instance where two suits have been brought, and, in view of the diligence which has been shown by many attorneys in cases of this kind, it is hardly conceivable that the second one would have been omitted if it had been thought that it could be maintained.*"

Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. 205, 207.

But even if the heirs are permitted to recover both for the personal injuries and for wrongful death, nevertheless but one recovery should be allowed. As was pointed out by Judge Neterer in his decision upon plaintiff's motion to strike the second affirmative defense, a recovery under one of these sections "is predicated upon and supported

by the same facts" as a recovery under the other section.

Frescoln v. P. S. T., L. & P. Co., 225 Fed. 441.

A recovery cannot be had under the death act unless the deceased has sustained a personal injury which results in his death, and an action for personal injuries does not survive under the survival act unless such personal injuries result in the death of the person injured. As already pointed out, the same heirs who are permitted to recover under the death act are likewise permitted to recover under the survival act. The cause of action under the death act is the negligent act causing the personal injury followed by the death of the injured party. The cause of action under the survival act is the same. The only difference, if any, is in the measure of damages. On what theory then, can it be claimed that the defendant guilty of the negligent act should be burdened with two independent suits rather than one suit? The parties are the same. The facts stated in the complaint,—with the exception of the matter relating to the damages sustained, are identical. In fact there is but one cause of action, namely, the neg-

ligent act followed by the death of one injured party, the two sections merely providing for two different elements of damage, the one the damages sustained by the injured party which are for the benefit of the plaintiff, and the other the damages sustained by the plaintiff himself. To say that two independent actions may be brought in such a case is to say that a single cause of action can be split so as to permit two independent actions based upon a single cause of action where the plaintiff and defendant are the same in each action, which is never permitted. That a plaintiff will not be permitted to split his cause of action and recover a portion of the damages sustained as a result of a single wrong in one action, and later be permitted to maintain a second suit for other damages arising out of the same wrong, has been repeatedly decided by the State Supreme Court.

Achey v. Creech, 31 Wash. 319.

Bruce v. Foley, 18 Wash. 96.

Kline v. Stine, 46 Wash. 546.

Wheeler v. Aberdeen, 45 Wash. 63.

CONCLUSION.

Whatever may be the holding in states where the beneficiaries under the death act are different from those under the survival act, clearly in the State of Washington where not only the beneficiaries are the same but the same heirs may maintain the action for wrongful death that may revive the action for personal injuries sustained by the deceased, an action originally brought by the deceased himself and revived by the statutory beneficiaries and prosecuted to final judgment should be a bar to an action for wrongful death. This, we submit, should be the rule for the following reasons:

(1) The beneficiaries under the death statute and the survival statute are the same, and the Legislature certainly did not contemplate that the same parties plaintiff should be entitled to recover twice for the same wrongful act. These sections are a derogation of the common-law, and should be strictly construed.

(2) To permit two recoveries would be to permit double damages to be assessed against the wrongdoer, for it would permit a recovery of the full amount of damages sustained by the deceased,

and would then permit a second recovery by the same individuals for the full amount of damages resulting to them from the death of the deceased. This could not have been the legislative purpose.

(3) The State Supreme Court has held that a release given by the deceased in his lifetime is a bar to an action for wrongful death. It logically follows that the prosecution to judgment of a revived action for the personal injuries sustained in which all the damages sustained by the deceased are recovered, should also be an extinguishment of the right of the deceased and a bar to a subsequent or concurrent action for wrongful death.

(4) The State Supreme Court has held that where the widow of a fireman by one statute is given the right to recover as a beneficiary in a Fireman's Relief Fund and by the death statute herein quoted is given the right to recover for wrongful death, such widow has an election of remedies, and where she elects to recover under one statute such recovery is a bar to an action under the other.

(5) It has evidently been the common opinion of the bar of the State of Washington that two concurrent actions could not be maintained under the death and survival statutes.

(6) If a recovery can be had both for the personal injuries and for the death itself, in any event, since there is but one cause of action and since the beneficiaries under each statute are the same, the damages should be recovered in one suit and not in two.

For the reasons urged we respectfully submit that the judgment of the lower court should be reversed.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a corporation,	}	No. 2887
<i>Plaintiff in Error,</i>		
vs.		
ANNA F. FRESCOLN,	}	
<i>Defendant in Error.</i>		

Reply Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION

THOS. H. BAIN,
Attorney for Plaintiff in Error.

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United States Circuit Court of Appeals

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Reply Brief of Defendant in Error

The "Statement" by the Plaintiff in Error is fair and covers the case, as well also, the history of the enactment by the Washington Legislature of the two statutes involved in the suit at bar.

The sole and only question in this case is whether

or not there is a right of two actions under Sections 183 and 194 Rem. & Bal. Code of Washington.

Plaintiff in Error cites many cases, (Plff. in Error's Brief, p. 11), quotes at length and argues earnestly as to who are "heirs or personal representatives." There is no question or dispute as to that point in the case.

On page 15 of the brief many cases are cited to show that "*but one action* can be maintained," with an evident intent to have us believe that they apply to and cover the two statutes, but such is not the case. Each and every case cited simply holds that the beneficiaries under the death act can not split their actions, and do not cover the two statutes or the right of an action under each. When these two questions, neither of which are in this case, are eliminated, but the one question, as to the right of two actions is left.

It is asserted with apparent earnestness that "two recoveries for one wrong" should not be permitted; failing to observe that one negligent act may cause two distinct injuries, as in this case. There is one injury to the estate and another to the dependent representatives, hence a right of action by each. Supposing I should step into my backyard and shoot my next door neighbor and that the bullet should

pass through his body and kill my second door neighbor. Would not each of their representatives have a right of civil action against me for damages?

Yet there would be but one overt or negligent act, but surely two injuries and both should be paid for.

On page 17 it is asked, "can it be the policy of the law that the heirs of the deceased should recover full compensation for the injury received by the deceased, and that in a second action the same heirs be permitted to recover full compensation for the death of the injured party?" That is not a fair question for the heirs are not the same in these two cases. In the survival case every legal heir is a beneficiary of the verdict, while in the *death* action only the defendant relatives are the beneficiaries, and full compensation for the injury has not been recovered.

It is as simple a proposition as the right to two actions on a promisory note payable in installments.

This will be fully brought out by authorities cited later.

Concurrent actions should be allowed because the elements of damage in the two actions are not at all the same although growing out of the same wrong. There is nothing inconsistent in a right of two actions in such cases and under such statutes.

“The fact that two causes of action spring out of the same contract will not ipso facto render a judgment on one a bar to a recovery on the other.”

23 Cyc. 443.

“The right of action given to an administrator to sue for his intestate’s loss of life for the benefit of the widow and children is independent of the administrator’s right to sue for damages suffered by the intestate during his life-time from the injury which caused his death and both actions may proceed at the same time.”

Bowes vs. City of Boston, 155 Mass. 344, 15
L. R. A. 365,

13 Cyc. 326.

According to the argument of Plaintiff in Error it seems it would have required us, when the death occurred, to have dismissed the action for damages then pending and not revived it, but rely upon our right under the death act, virtually admitting that the death act abrogates the survival act, which is not true.

The two acts are to be construed together. They were clearly designed to *enlarge*, rather than to diminish, the rights of recovery and are both remedial, and it was not the intention to require an election of remedies.

Neither act is repealed by the other:

Noble vs. City of Seattle, 19 Wash. 138;

Mesher vs. Osborne, 75 Wash. 443;

Swanson vs. Pac. Shipping Co., 60 Wash. 87,
110 Pac. 795.

That no recovery for the death could have been had in the first action is well settled by the Washington Supreme Court, in *Thompson vs. Seattle, Renton & Southern R. Co.*, 71 Wash. 443, 128 Pac. 1070.

“The jury could award nothing for her death, nothing for the losses caused the respondents by reason of her death, and nothing by way of punishment of the appellant because of its negligence,” citing:

Swanson vs. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795;

Helland vs. Bridenstine, 55 Wash. 470, 104 Pac. 626.

On the question of the validity of the two sections 183 and 194, the court says in the Swanson case above cited:

“Both sections were originally enacted in one and the same statute. Each was intended to serve its separate purpose, and must be so construed as to secure that result. The trial court committed no error in allowing the substitution of parties plaintiff, in permitting the filing of the supplemental complaint, or in the theory upon which it admitted evidence, instructed the jury and tried the case.”

I call special attention to the instructions in the Thompson case, which were approved by the Supreme Court.

While there has been much disagreement by the courts on the question here involved, we believe the great weight of the later authorities especially bear out our contention, and surely the most reasonable, just and logical arguments sustain our contention.

We will be content with citing a number of cases and quoting from a few, which conclusively show that in this case there should be

TWO ACTIONS ALLOWED.

Hedrick vs. Ilwaco R. & Nav. Co., 4 Wash. 400, 30 Pac. 714;

Swanson vs. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795;

Thompson vs. Seattle, Renton & S. R. Co., 71 Wash. 436, 128 Pac. 1070;

Walters vs. Chicago R. I. & P. R. Co., 36 Ia. 458;

Bradley vs. Andrews, 51 Vt. 525;

Hurst vs. Detroit City R. Co., 84 Mich. 539, 48 N. W. 44;

Bowes vs. City of Boston, 155 Mass. 344, 15 L. R. A. 365;

Westcot vs. Central Vt. R. Co., 61 Vt. 440, 17 At. 745;

Belding vs. Black Hills & Ft. P. R. Co., 3 S. D. 369, 53 N. W. 750;

Brown vs. Chicago & N. W. Ry. Co., 102 Wis. 137, 77 N. W. 748 and 78 N. W. 771;

Missouri P. R. Co. vs. Bennett (Kas. App.), 47 Pac. 183;

Brodie et al. vs. Wash. Water Power Co., 92 Wash. 574, 159 Pac. 791;

Lehmann vs. Farwell, 95 Wis. 185, 70 N. W. 170;

In the Hedrick case the court says:

“Two actions may thus spring from the same wrongful act, because two distinct injuries are thereby inflicted. But the actions are prosecuted in different rights and the damages are given upon different principles.”

In *Hurst vs. Detroit City R. Co.*, it is held that a recovery in one action is no bar to recovery in the other action.

In the Belding case speaking of the survival act the court says:

“The only damages recoverable under the section are such as the estate has sustained but not for the loss of the life of the deceased.”

In *Brown vs. Chicago & N. W. Ry. Co.*, 78 N. W. 771, on the motion for rehearing:

“Where a statute to be construed is too plain to admit of any other construction than that which the ordinary meaning of words suggest, the maxim ‘Noscitur a Siciis’ can not be adopted.”

I am somewhat surprised at the temerity of the

writer of Plaintiff in Error's brief in citing and quoting at such length (pp. 24 to 29) from the case of *Brodie vs. Washington Water Power Co.* 92 Wash. 574, 159 Pac. 791, evidently for the purpose of showing that where the plaintiff before his death had made a full settlement for his injuries, his dependent relatives could not maintain an action under the death act. *That question is not in the case at bar at all.* The writer of the brief in that self same Brodie case seems to have overlooked the fact that the court said:

"The statutes were enacted to overcome defects thought to exist in the common law. * * * The first section of the statute cited is plainly a survival statute. Its purpose is to preserve in the beneficiaries named therein such right of action as the injured person himself had because of the wrongful or negligent act causing the injury, and is confined to such personal loss as the injured person sustained. The second, although originating in the same wrongful act or neglect, begins where the other ends and is confined to such loss and damage as the beneficiaries named have suffered by the death of the person injured," citing both the Swanson and Thompson cases heretofore herein cited. This case seems to practically refute the assertion (Plff. in Error's brief, 13), that the state court has never squarely decided this point.

On page 20 of Plaintiff in Error's Brief they illustrate with an extreme case, by taking off both

arms and both legs of the victim. Why not carry it to a full extreme and put out his two eyes and destroy his hearing? In these days of advanced scientific appliances, with only both arms and both legs gone, my man who happened to be a minister of the Gospel could very soon have been rigged out with artificial limbs, and on that account advertise as an armless and legless preacher, and might have been more successful as such, and his life still valuable. We consider both illustrations rather weak.

Why not make an extreme case of the one at bar? Suppose Mr. Frescoln had possessed a small estate at the time of his death and had debts amounting to \$2,500, and had left a wife and three minor children and a stranger had been appointed by the Court as administrator of the estate. Would it have been proper for said administrator to step in and dismiss the action pending and tell the family that they could be fully compensated by bringing a suit under the death act? What would the creditors of the estate say to this administrator? Surely that right of action is an asset of the estate and as all the verdict obtained would have been consumed in the payment of the debts, the wife and minor children would not have had a cent for the injury suffered by them.

At page 24 of Plaintiff in Error's Brief, much is attempted to be made of the fact that in the action brought by deceased, he only sued for damages in the sum of \$5,323, while in the supplemental complaint afterwards filed, damage was asked in the sum of \$20,613. It should be remembered that in the first action the party was still living and no doubt, little realized the extent of his injury. He was injured on the 22nd day of November, 1913; he brought his suit on the 22nd day of January, 1914; he died on the 15th day of September, 1914. The damage, therefore, had been very much augmented between the time of the bringing the suit and the time of his death, and we are sure this Court recognizes the custom of naming large sums in such class of cases.

In *Mahoning Valley R. Co. vs. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. 893 the Court said:

"It is manifest from the foregoing that the revived action and the later action are not the same. They rest primarily upon the same alleged negligence of the defendant and the same absence of contributory negligence of the injured person; but in the revived action, the damages are for personal injuries to the injured person for which an action would lie if death had not ensued, and such damages to insure when recovered to the benefit of the estate, while in the later action the suit is prosecuted in the

interest of other parties, and the measure of damages is the pecuniary loss they have sustained by the death. In the later case death gives the right of action under the statute, while, had the pending action not been susceptible of being revived, the death would have terminated the right to recover in the interest of the estate."

Plaintiff in Error has cited the Michigan cases, for which we are very much pleased and it quotes at length from Justice Long's opinion in the *Sweetland* case. I consider that the arguments by the members of that Court to be about the most exhaustive and clear of any that I have been able to find, but I submit that the dissenting opinions of Chief Justice Montgomery and Justice Hooker in the *Sweetland* case are by far the better arguments on the question.

In the case of *Dolson vs. Railroad Co.*, 128 Mich. 444, 87, N. W. at page 633, Justice Moore says, "The question involved here was discussed in the case of *Sweetland vs. Ry. Co.*, 117 Mich. 329. Justice Montgomery was of the opinion a recovery could be had under both acts; Justice Hooker was of the opinion recovery could be had under the survival act and not under the death act; Justices Long and Grant were of the opinion recovery could be had only under the death act; while I was of the opinion there was no evidence to show the deceased endured pain and suffering after her injury and therefore, under the record as made, there could be no recovery and it was not necessary to pass upon the other question. The result of the discussion in that case is that three

of the judges held that there could be a recovery under the death act, two of the judges held there could be a recovery under the survival act, one of the judges held there could be a recovery under both acts, and one expressed no opinion as to whether recovery could be had under either or both acts; so it cannot be said the question is concluded in this Court."

And a few excerpts from the same opinion, several quoted by Justice Moore from an article in 28 Am. Law Reg. (N. S.) 385, 513 and 577, "We consider (1) that the purpose of this action is to compensate certain persons for indirect injuries to them involved in causing the death of another * * * and (3) that the damages given in the action entirely exclude such as the deceased himself could have recovered,—we find it impossible to reach any other conclusion * * *. The simple answer to this question is that the two actions are brought for different consequences of the same act and are certainly as distinct from each other as is the action brought by a husband or a father for an injury to his wife or child from the personal action of the wife or child for the same injury * * *. If this is the correct view, it will sometimes happen that two actions will be maintainable after death, one representing the injured person's cause of action, the other the family's cause of action."

And speaking of inconsistency of the two acts, which is urged by some authorities, he goes on to say, "There is seeming force in this objection, but the charge of inconsistency ought to be laid at the door of the legislature which enacts the statutes * * *. The language of the statutes when viewed in the light of the evi-

dent legislative purpose is too plain to justify courts in interpolating in them language not there by necessary implication from the context * * *. It takes the wrongful act and the loss to make a complete cause of action and, as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct * * *. Such damages to the widow and next of kin begin where the damage of the intestate ended, viz. with his death."

A few quotations from Justice Montgomery in the Sweetland case, "The remedies afforded are, however, quite distinct and different. Under Sec. 7397 it is clear that no recovery could be had by the executor because of the fact of the death of his testator, but he could recover from such injury as his testator sustained in his lifetime, notwithstanding his death, while under the Act of 1848 the recovery is limited to the pecuniary loss resulting from such death, to the person who may be entitled to such damages when recovered. It is clear, therefore, that the act of 1848 does not cover the whole ground, as, if the case be such that the widow or next of kin is unable to show pecuniary loss resulting from the death, no recovery can be had, notwithstanding the deceased may have been entitled to substantial damages if he had taken action in his lifetime, and notwithstanding the express provision of Sec. 7397 that his cause of action shall survive * * * thus leaving the right conferred under Lord Campbell's act dependent on the question whether the executor shall be more concerned for the creditors than the beneficiaries named in the act—a view which we regard as totally untenable."

And a few quotation from Justice Hooker in the

same case, "If we are to sustain the contention that the death act is exclusive, it must be held that it repeals by implication so much of the survival act as before the enactment of the death act applied to and supported actions by representatives for rights of action which accrued to persons injured through assaults and batteries * * *. This means that there can be no survival of an action in the case where death ultimately results from the wrong. It would be lost by death, not only where there are representatives to suffer by the death, and who may therefore recover for their pecuniary injury, but also where there is no pecuniary injury to anyone through death, in which case all right of action would be lost; this rule would go so far as to put an end to pending suits, at whatever their stage before the verdict, and notwithstanding the fact that large sums had been expended which would be lost to the estate."

But the Supreme Court of Michigan has settled the question in that state of "two rights of action," by a unanimous opinion rendered July 15, 1909. In the case of *Fournier vs. Detroit United Ry.*, 122 N. W. 299.

"A declaration, alleging damages sustained through an injury resulting from defendant's negligence, cannot be so amended, after plaintiff's death in the revival of the action in the name of the administrator, as to authorize a recovery of damages for wrongful death, authorized by Pub. Acts 1905, p. 120, No. 89; the amendment being a new and different cause of action." And citations therein made.

In *Hurlbut vs. City of Topeka*, 34 Fed. 510, Justice Brewer quotes approvingly and at length

from *Needham vs. Railroad Co.*, 38 Vt. 294, and also from *Blake vs. Railroad Co.*, 10 Eng. Law. & Eq. 443, and these he follows with an argument which seems to me to be unanswerable. "It is obvious that both these causes of action may exist against two different parties, and why may they not exist against the same party? Suppose A commits an assault and battery upon B. A cause of action exists in favor of B against A, for those injuries which survived by Sec. 420 (Referring to the Kan. Statute). Suppose, after an action is instituted by B, he should be killed by the wrongful act of C. There certainly would be an action under Sec. 422 against C for such wrongful death. Would that defeat the first action or would not that survive as provided under Sec. 420? If that be true where there are two wrong doers why should it not also be true where there is but one wrong-doer? * * * as I said before this Court is bound to administer the laws of the state as interpreted by her Supreme Court."

The Kansas Court in its early cases was wrong but the foregoing seems to have persuaded it to get right on the question. In *Missouri P. R. Co. vs. Bennett* (Kans. App.), 47 Pac. 183, which was an action to invoke the appointment of an executor so as to prevent him from prosecuting a suit brought by the injured party it was held that two causes of action are given by Kan. Civ. Code., Sec. 420, providing that action for injury to the person shall survive and Sec. 422, providing that the personal representatives may recover for the death if the

injured party might have recovered if he had lived, and the damages must inure to the widow and children. Under the first action the right of action survives for the benefit of the estate, and under the second a new right of action is created for the sole benefit of the widow, children or next of kin, (Disapproving *McCarthy vs. Chicago R. I. & P. R. Co.*, 18 Kas. 46, 26 Am. Rep. 742).

But we fail to see why we should seek any further outside authorities and continue quoting opinions, when the question here involved has been clearly and forcibly settled by this Court, for it has said in *Northern Pac. Ry. Co. vs. Adams, et al.*, 116 Fed. 324, "The statutes have been variously held to be penal and remedial, and accordingly given strict and liberal constructions. But under the most liberal interpretations implied provisions cannot be introduced into a statute where no ambiguity appears. The intention of the lawmakers is to be determined by the words they employ; and, where statutes have been enacted by certain states omitting provisions which occurred in similar statutes in other states, courts have no right to presume that such omission was negligent or unintentional, especially where the language is clear and conclusive without such clauses. In such cases there is nothing to construe.

Language bearing a plain import needs no extended construction. In the statutes of both Idaho and Washington the clause limiting the right of action to circumstances which would have permitted the deceased to sue is entirely omitted, and nothing appears elsewhere to warrant its insertion by implication. The omission must therefore be considered as unintentional and the legislative will to be completely expressed without such limiting provision. The right of action given by such statutes is to the heirs or personal representatives of a person killed by the wrongful act of another, not for the injuries or damages caused to the deceased but for the injuries and damages caused to his heirs or representatives by reason of the loss of the deceased. It cannot be dependent upon the right of the deceased to such an action if living, for it does not come into existence until his death by the wrongful act of another. It then springs into existence by virtue of the statute, in the heirs or personal representatives, purely and simply because they have been damaged by the wrongful or negligent act of another, the relationship existing between the deceased and the party causing the death having no bearing upon the right of action other than as a circumstance to be considered in determining the degree of negligence. In the case of *Munroe vs.*

Reclamation Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, the Supreme Court of California in construing a similar statute to those in controversy herein, held the act given for a death caused by negligence to be a new action and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury. The Supreme Court of the United States in the case of *Railroad Co. vs. Dixon*, 179 U. S. 131, 135, 21 Sup. Ct. 67, takes the same view. A statute of the State of Kentucky was there under consideration which contained no words of limitations of the right of action given for the death of a person by negligence or wrongful act. The Court said: 'The cause of action thus created is independent of any right of action the deceased may have had or would have had if he had survived the injury.'

Under the statute of both Idaho and Washington, then, the plaintiffs had a right of action against the defendant Railroad Company for the just damages to them resulting from the death of the said Jay H. Adams if his death was caused by the negligence of the Railroad Company; and this right of action was in no way dependent upon any right existing in the deceased before his death, or which might have accrued to him had he survived."

In th case of *Railroad Co. vs. Dixon, supra*, Chief Justice Fuller said: "The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury:" and in *Munro vs. Reclamation Co., supra*, it is said: "The act * * * gives to the representatives a totally new right of action on different principles."

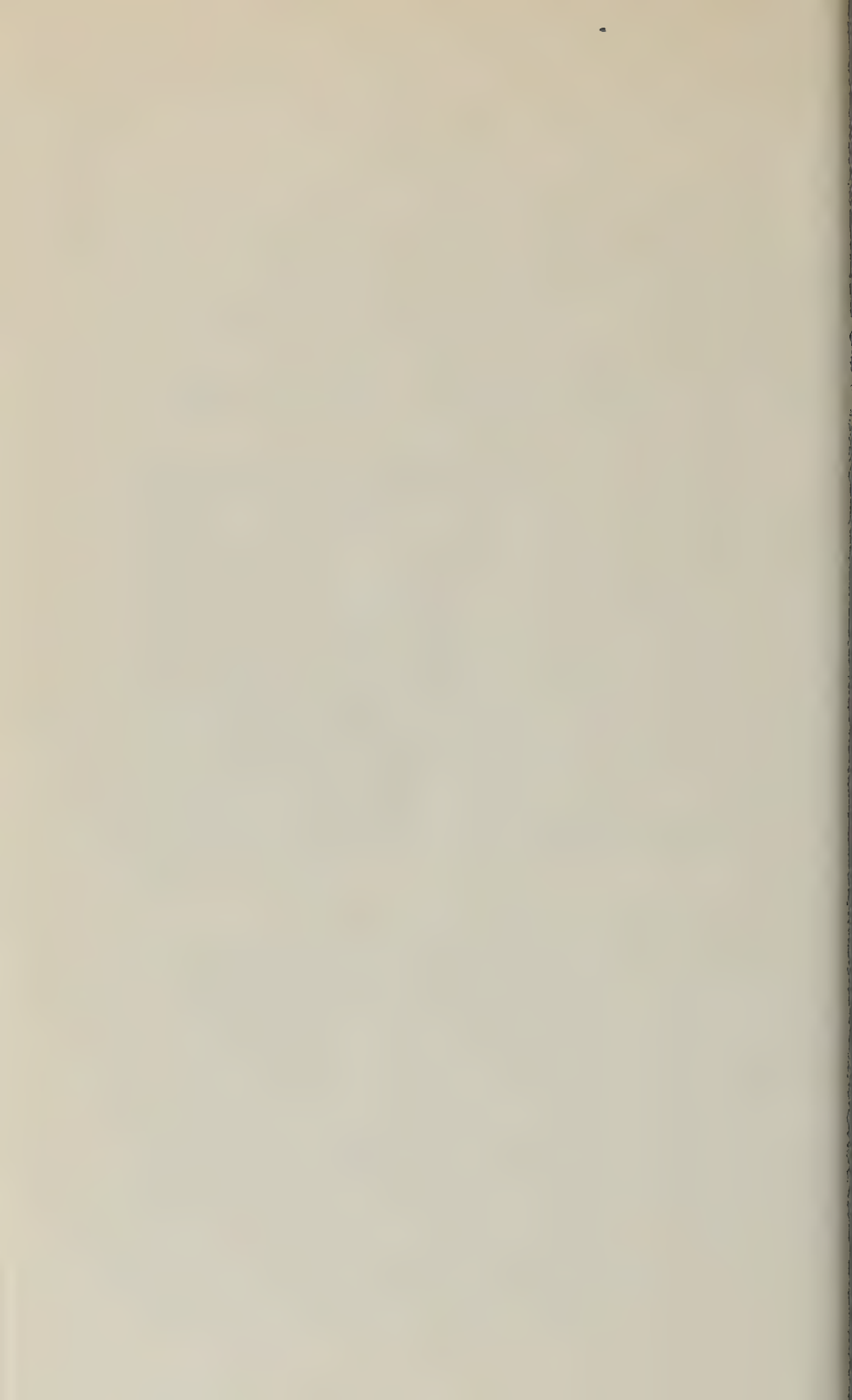
For the reason that the question raised in this case has been heretofore so clearly settled in this jurisdiction, 1st by our State Supreme Court, 2nd by Judge Neterer in his holdings and rulings in the lower court, and 3rd by the opinion of this court in the case last quoted, we believe it is plainly manifest that the writ of error was sued out in this case for the sole purpose for delay, and comes under Section two of Rule 30. We therefore ask that damages in the sum of ten per cent in addition to the interest be awarded the Defendant upon the amount of judgment.

We forego any extended CONCLUSION—there can be but one—further than to enter a general denial to those of the Plaintiff in Error, and to say that the contrary is true of each and every one, excepting number four.

For the reasons urged we respectfully submit that the judgment of the lower court should be affirmed.

THOS. H. BAIN,

Attorney for Defendant in Error.



No. 2887 4

United States Circuit Court of Appeals

For the Ninth Circuit.

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vs.

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Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

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F. D. Monckton,

United States Circuit Court of Appeals

For the Ninth Circuit.

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REPLY BRIEF OF PLAINTIFF IN ERROR

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Counsel for defendant in error argues that the recoveries under the survival and death statutes are in different rights. Thus on page 3 of his brief he says:

“In the survival case every legal heir is a beneficiary of the verdict, while in the death action only the dependent relatives are the beneficiaries,” etc.

This, as we fully explained in our opening brief, is not the case. The death act (Rem. & Bal. Code, § 183) provides:

“ * * * When the death of a person is caused by the wrongful act or negligence of another, his *heirs or personal representatives* may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his *parents, sisters or minor brothers* who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action. * * * ”

That the word “heirs” includes only such heirs as are mentioned in the section has been decided by the state supreme court in many cases, cited on page 11 of our opening brief. Thus in *Copeland v. Seattle*, 33 Wash. 415, 419, the court, construing sections 183 and 194, said:

“Construing these sections, we have held that the term ‘heirs’ meant the widow and children of the deceased, and did not include parents and collateral heirs, and that the only person who could be the beneficiaries of such an action were the wife and children of the deceased. *Graetz v. McKenzie*, 3 Wash. 194, 28 Pac. 331; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225, 28 Pac. 33, 29 Pac. 263; *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400, 30 Pac. 714; *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868; *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore, etc. Refining Co.*, 26 Wash. 484, 67 Pac. 274.”

It is true that section 183 also allows the “personal representatives” to maintain the action for wrongful death, but it is equally true that when the action is waged by the personal representatives the

fruits of the action go to the heirs expressly mentioned in the statute and not to the estate. In *Koloff v. R. Co.*, 71 Wash. 543, 549, the court said:

“This court has held that no right of recovery for wrongful death existed at common law * * * that the sole beneficiaries of the right of action are the widow and children and not the parents or collateral heirs * * * and that, *where an action is prosecuted in the name of the personal representative, it is not for the benefit of the estate, but for the sole benefit of the widow and children who share jointly in the damages recovered.* *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333.”

Of course, since the amendment of this section in 1909 the word “heirs”, under the numerous decisions quoted, would be held to include, not only the widow and minor children, but also those beneficiaries added by the amendment of 1909, namely, “parents, sisters or minor brothers,” where the deceased left no widow or issue, and while the personal representative can still maintain the action, “it is not for the benefit of the estate, but for the sole benefit of the widow and children” or, if the deceased left no widow or issue, then for the benefit of the “parents, sisters or minor brothers.”

So much for the death statute. The survival statute (Section 194, Rem. & Bal. Code quoted in full on page 9 of our opening brief) provides:

“No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death,
 * * * but such action may be prosecuted, or commenced and prosecuted, in favor of such *wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers,*” etc.

In brief, under the death statute the action for wrongful death is to be prosecuted either directly by, or for the benefit of, the widow and children, or if there are no widow or children, then by the dependent “parents, sisters or minor brothers,” while under the survival act the right of action of deceased survives in favor of the wife and children, and if no wife or children then in favor of dependent parents, sisters or minor brothers. It follows that neither action is for the benefit of the estate of the deceased, but that the same heirs are the beneficiaries under either section.

Counsel for defendant in error cites a number of decisions in support of his contention that two concurrent actions may be maintained, the one under the survival and the other under the death act. These decisions, we submit, do not bear out counsel’s position.

The first case cited is that of *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400 (p. 6) There it was held that although the father, as administrator, had recovered a judgment for the death of his minor son under the death act involved in this action, such judgment was not a bar to an action by the father under section 9 of the Code of 1881 providing that the father may maintain an action as plaintiff for the injury or death of a child. The court allowed the two recoveries on the theory that the judgment in the action under the death act was for the benefit of the general heirs, while the fruits of the action under the special section went to the father alone; in other words, the two actions were allowed for the reason that *the two recoveries were in different rights*. The court there said in part:

“Two actions may thus spring from the same wrongful act, because two distinct injuries are thereby inflicted. But *the actions are prosecuted in different rights* and the damages are given upon different principles. The damages recovered by a parent for loss of services of a child belong to the parent in his own right and are not distributable among the heirs, and do not become a part of the estate of the deceased.”

That is exactly the distinction between the Hedrick case and the case at bar. There the two actions were “prosecuted in different rights.” Here the same heirs that recover under the survival act, if

counsel's contention is sustained, can again recover under the death act. That the rule is different where two statutes permit a recovery for wrongful death by the same heirs was decided by the state court in *Longfellow v. Seattle*, 76 Wash. 509, which case is reviewed at length in our opening brief on pages 15 to 17.

The case of *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, (p. 6) simply holds that upon the death of a plaintiff, suing for personal injuries from which he afterwards dies, his wife and minor children are properly substituted as parties plaintiff, to recover the damages to which the plaintiff would have been entitled had he lived. There is not even a suggestion in that decision as to whether a subsequent action may be prosecuted for the wrongful death.

The case of *Thompson v. R. Co.*, 71 Wash. 436, (p. 6) simply holds that an action for personal injuries sustained by a woman resulting in death may be revived by the minor heirs mentioned in the survival statute. It does not hold that another action may be waged by the same heirs for the wrongful death.

The case of *Walters v. R. Co.*, 36 Ia. 458 (p. 6) holds that in an action by the administrator of an infant to recover for his death, the recovery of dam-

ages is limited to those accruing to the estate after the infant would have attained his majority, and that for the damages accruing before that period, the father, if living, if not, the mother, might, under the Iowa statute maintain an action. The case is similar to, and is cited in, *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400, 405, above cited. It will be seen that the holding of the court avoids the allowance of double damages.

In *Bradley v. Andrews*, 51 Vt. 525 (p. 6), it was held that a former recovery by the father for loss of service, etc., of his minor son, consequent on bodily injuries occasioned by the defendant, is no bar to a recovery by the father as administrator of the son, of such damages as the son himself might have recovered, for, said the court:

“The intestate, being a minor, could not have recovered anything for loss of service or for expenses of nursing and treatment. Hence, the recovery by the plaintiff, as the father, for such items of damage, in a former suit, can be no bar to his recovery as administrator in this suit, of such damages as the intestate himself could have recovered.”

Two other Vermont cases are cited—*Westcot v. R. Co.*, 61 Vt. 440, 17 Atl. 745 (p. 6) which is not in point, and *Needham v. R. Co.*, 38 Vt. 294 (p. 15). Whatever the holding of these three earlier decis-

ions of the Vermont court, it was afterwards squarely held by that court that a judgment in an action under the survival act was a bar to an action for wrongful death.

Legg v. Britton, 64 Vt. 652, 24 Atl. 1016.

Hurst v. Detroit City Ry., 84 Mich. 539, 48 N. W. 44 (p. 6), does not decide the question raised by this appeal.

The only question considered in *Belding v. R. Co.*, 3 S. D. 369, 53 N. W. 750, (p. 6) was as to the proper party plaintiff in an action for wrongful death. The question involved in this appeal was not considered. It may be added that the Belding case was disapproved by the Washington Supreme Court in *Copeland v. Seattle*, 33 Wash. 415, 421.

The case of *Missouri Pac. Ry. Co. v. Bennett's Estate*, 5 Kan. App. 231, 47 Pac. 183, is a decision of an intermediate court of the state of Kansas holding that in the state of Kansas a right of action for personal injuries resulting in death survives to the personal representatives of the deceased. The court was not called upon to decide, and did not decide, what the effect of the prosecution to judgment of such an action would have upon the right to prosecute a second action for the wrongful death.

The decision, moreover, is contrary to the decisions of the court of last resort of that state.

McCarthy v. R. Co., 18 Kan. 46, 52;

Martin, Ex'r. v. Railway Co., 58 Kan. 475, 49 Pac. 605.

Brodie v. W. W. P. Co., 92 Wash. 574, 159 Pac. 791, is reviewed at length on pages 24 to 30 of our opening brief.

The extent of the decision of the court in *Lehmann v. Farwell*, 95 Wis. 185, 70 N. W. 170, was that a cause of action for personal injuries resulting in death, under the Wisconsin statute, survived to the personal representative of the deceased. The decision goes no further.

In *Brown v. Ry. Co.*, 102 Wis. 137, 77 N. W. 748 and 78 N. W. 771, the court expressly refused to pass upon the question raised here, saying:

“Of course, there is no question as to whether a recovery on one claim will bar an action for the other; therefore, what is said should not be taken as deciding that question.” (77 N. W. 752)

In *Hurlbut v. City of Topeka*, 34 Fed. 510, the court followed the Kansas case theretofore decided to the effect that a right of action for personal injuries survived only when it did not result in death.

Whatever was said to the contrary in the course of the decision is pure dictum.

Counsel for defendant in error has devoted a considerable portion of his brief (pp. 11-14) to quotations from various dissenting opinions from Michigan cases in spite of the fact that the supreme court of that state has definitely and repeatedly held that a recovery cannot be had both for personal injuries and the wrongful death in two separate actions.

Sweetland v. R. Co., 117 Mich. 329, 75 N. W. 1066;

Dolson v. Ry. Co., 128 Mich. 444, 87 N. W. 629;

Storie v. Elevator Co., 134 Mich. 297, 96 N. W. 569;

Rouse v. R. Co., 164 Mich. 475, 129 N. W. 719.

The case of *Fournier v. Ry.*, 122 N. W. 299, cited by counsel on page 14 of his brief, does not change this rule.

Two other cases are cited by counsel for defendant in error, one from Massachusetts (p. 6) and one from Ohio (p. 10).

Bowes v. City of Boston, 155 Mass. 344, 29 N. E. 633;

Mahoning Valley R. Co. v. Van Alstine, 77
Ohio St. 395, 83 N. E. 601.

While these cases hold that under the statutes of their respective states a judgment in an action brought under the survival statute does not bar an action under the death statute, yet an examination of the statutes of these two states will reveal, we submit, a vital distinction between such statutes and the statutes of the state of Washington; namely, that *the recovery under the survival act and the death act are in different rights*. The action under the survival act is for the benefit of the estate of the deceased, while the action under the death act is for the benefit of certain heirs named in the statute. This, we believe, will be found to be true of the statutes of every state where two actions are allowed. As we have previously shown, this is not true of the statutes of Washington. The action under either act is for the exclusive benefit of the same identical heirs. In neither case is the action prosecuted for the benefit of the estate of the deceased. It is also to be noted that in Ohio and Massachusetts the amount of recovery under the death act is limited, which is not true of the death act of Washington. While it may be granted that the legislature has the power to split the total

aggregate damages resulting from a wrongful act resulting in death by giving a part to the estate and a part to the heirs, we cannot believe that this court will hold it to have been the legislative intent to permit the same heirs to recover twice for the same negligent act resulting in the death of the injured person.

Finally counsel devotes pages 16 to 18 of his brief to an extended quotation from the case of *Northern Pac. Ry. Co. v. Adams*, 116 Fed. 324. We believe it sufficient to say that the Adams case was later reversed by the United States supreme court.

N. P. Ry. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513.

For the reasons urged in our opening brief we respectfully submit that the judgment of the lower court should be reversed.

JAMES B. HOWE,
H. S. ELLIOTT,
Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

ED JOHNSON and A. C. LAIRD,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Alaska, Second Division.

Filed

JUL 3 - 1917

F. D. Monckton,
Clerk.

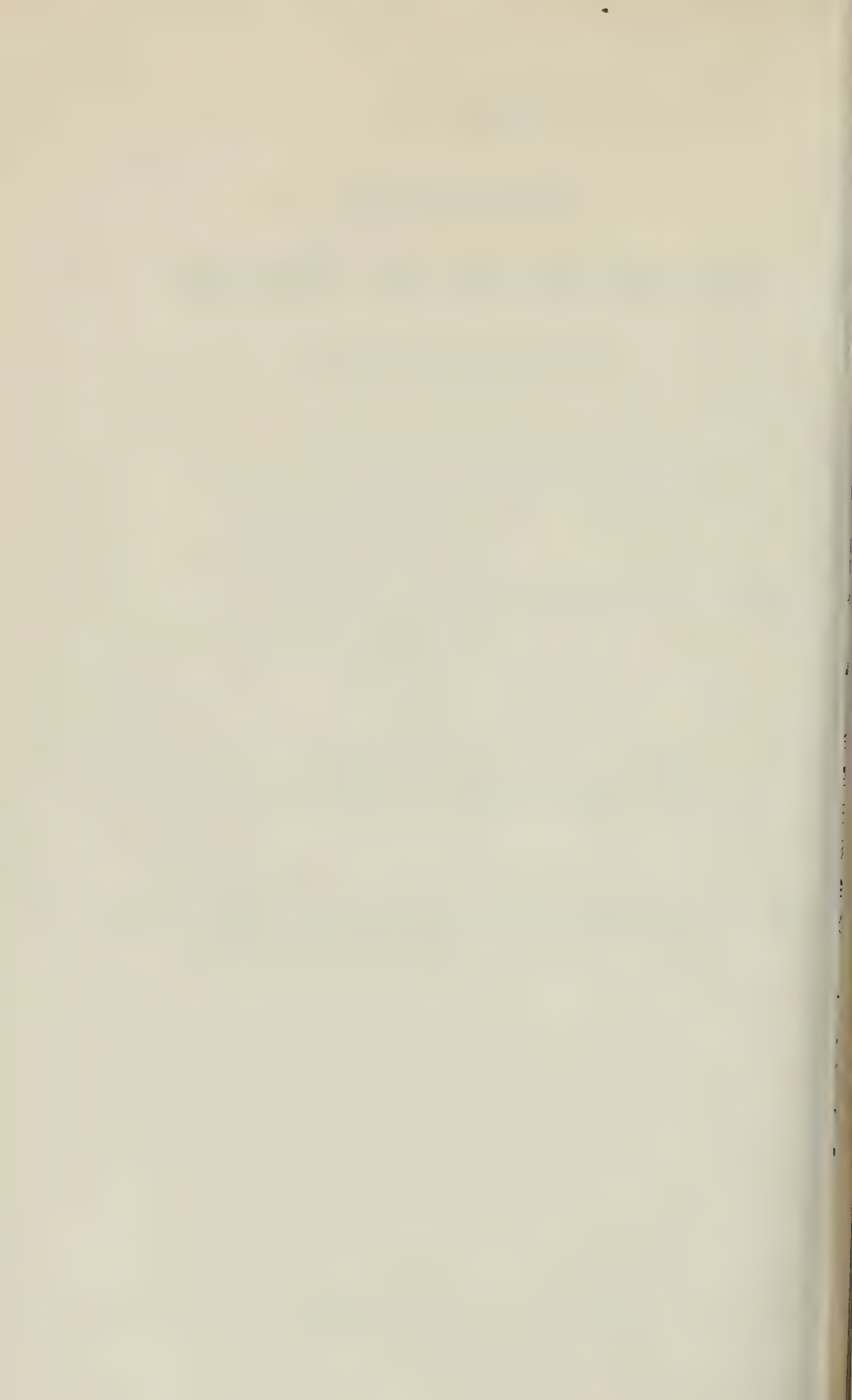
No. 2891

United States
Circuit Court of Appeals
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ED JOHNSON and A. C. LAIRD,
Plaintiffs in Error,
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Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Alaska, Second Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

F. M. SAXTON, District Attorney, Nome, Alaska,
Attorney for Plaintiff,

GEORGE B. GRIGSBY, HUGH O'NEILL, Nome,
Alaska,

Attorneys for Defendants. [1*]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
ITZ, JOHN NOVOSEL, NICK SKORLICH,
ALFRED PIERSON, ADELBERT G.
GUMAER,

Defendants.

Indictment.

For violation of Section 2032, Compiled Laws.

At a general term of the District Court of the District of Alaska, Second Division, in the year one thousand nine hundred and sixteen, begun and held at Nome in said District and Territory beginning the 29th day of January, 1916, the grand jury for said Division No. 2, district and territory aforesaid, empaneled and charged for said Territory and District of Alaska, Division No. 2, accuses Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson, Adelbert G. Gumaer, of

*Page-number appearing at foot of page of original certified Transcript of Record.

the crime of gambling committed as follows:

The said Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novisel, Nick Skorlich, Adelbert G. Gumaer, Alfred Pierson, on the 5th day of January, 1916, in the municipality of Nome, and District of Alaska, did wrongfully and unlawfully deal, play, carry on, open, cause to be opened, and conduct a certain game called "stud poker" which said game was then and there a game played with cards for money, checks and chips as representatives of value, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

SECOND COUNT.

And the grand jury by this indictment further accuse the said Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Adelbert G. Gumaer, Alfred Pierson, of the crime of gambling committed as follows: [2]

The said Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Adelbert G. Gumaer, Alfred Pierson, on the 5th day of January, 1916, in the municipality of Nome, and District of Alaska, did wrongfully and unlawfully deal, play, carry on, open, cause to be opened, and conduct a certain game called "pangingi," which said game was then and there a game played with cards for money, checks and chips as representatives of value, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

Dated at Nome, in the District and Territory and Division aforesaid, this 6th day of April, 1916.

F. M. SEXTON,

United States Attorney.

Witnesses examined before the grand jury:

Phil Holland,

Frank Martin,

A. B. Miller,

Charles Mason,

J. Terrell,

A. Hanson,

W. Dougherty,

Frank C. Dean,

N. B. Nelsen.

[Endorsed]: #1036. Crim. The District Court, District of Alaska, Second Division. The United States vs. ———. A True Bill. Frank P. Williams, Foreman. Filed A. D. 1916. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 6, 1916. G. A. Adams, Clerk. By ———, Deputy. F. W. L. F. M. Sexton, U. S. Attorney. [3]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
ITZ, JOHN NOVOSEL, NICK SKORLICH,
ALFRED PIERSON, ADELBERT G.
GUMAER,

Defendants.

Motion to Quash Indictment.

Come now the defendants in the above-entitled action by and through their attorneys, George B. Grigsby and Hugh O'Neill, and move the Court to quash the indictment herein on the following ground:

That said defendants and each of them have been once in jeopardy for each of the offenses charged in said indictment in this: That on the 8th day of January, 1916, said defendants were tried in the U. S. Commissioner's Court for Cape Nome Precinct, Second Division of the Territory of Alaska for the identical offenses charged in said indictment, by James Frawley, U. S. Commissioner and Ex-officio Justice of the Peace, on an information theretofore filed in said Commissioner's Court, which information was entitled "United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Chas. Mason, Alfred Pierson, B. Garnard, A. Hanson, N. B. Nelsen, defendants."

This motion is based upon the records, proceedings and files of said U. S. Commissioner's Court in said action, and on the affidavit of George B. Grigsby hereunto annexed and made a part hereof.

Dated at Nome, Alaska, this 11th day of April, 1916.

GEORGE B. GRIGSBY,

HUGH O'NEILL.

Attorneys for Defendants. [4]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
ITZ, JOHN NOVOSEL, NICK SKORLICH,
ALFRED PIERSON, ADELBERT G.
GUMAER,

Defendants.

**Affidavit of George B. Grigsby in Support of Motion
to Quash Indictment.**

United States of America,
Territory of Alaska,
Second Division,—ss.

George B. Grigsby, being duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendants herein. That on the 7th day of January, 1916, an information was filed in the U. S. Commissioner's Court for the Precinct of Cape Nome, Second Division, of the Territory of Alaska, charging the defendants herein with the identical offenses charged, or attempted to be charged, in the indictment herein. That affiant represented the defendants herein in all proceedings in said U. S. Commissioner's Court in relation to said offenses.

That on the 7th day of January, 1916, at the hour

of 2 o'clock P. M. of said day affiant appeared in said U. S. Commissioner's Court as attorney for all of said defendants in said action theretofore commenced by the filing of said information and requested the Court to enter a plea of not guilty for each of said defendants and demanded a jury trial. That thereafter said U. S. Commissioner James Frawley refused said demand for a jury trial and proceeded to hear the evidence in said action and thereafter jailed and refused to find the defendants, or any of them guilty or not guilty of the offenses charged, or either of them, but did order all of said defendants except Charles A. Mason, A. Hanson and N. B. Nelson to be held to answer to the District Court. [5]

That by reason of the information filed in said Commissioner's Court against said defendants and their appearance personally and by attorney and the laws of Alaska the said James Frawley, United States Commissioner, had jurisdiction of said action and jurisdiction of the person of the defendants and jurisdiction to try said action as Ex-officio Justice of the Peace.

WHEREFORE affiant alleges that the defendants herein have been in jeopardy by reason of having already been tried for the identical offenses charged, or attempted to be charged, in said indictment, and that the above-entitled court is without jurisdiction to hear this action.

GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 11th day of April, 1916.

[Notarial Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires May 12, 1917.)

[Endorsed]: In the District Court for the District of Alaska, 2d Division. United States of America, Plaintiffs, vs. Ed. Johnson et al., Defendants. Motion to Quash and Affidavit. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 10, 1916. G. A. Adams, Clerk. By ———, Deputy. F. W. L. George B. Grigsby, Hugh O'Neill, Attorneys for Defendants. [6]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, General 1916 Term, beginning January 29, 1916.

Tuesday, April 11, 1916, at 2 P. M.

Court convened pursuant to adjournment—Honorable J. R. TUCKER, District Judge, presiding.

Upon the convening of Court the following proceedings were had.

1036C.

UNITED STATES

vs.

E. JOHNSON et al.

**Minutes of Court—April 11, 1916—Order Overruling
Motion to Quash Indictment, Plea, etc.**

Defendants represented by counsel Geo. B. Grigsby and Hugh O'Neill. United States represented by F. M. Saxton, District Attorney.

Counsel for defendants moved to quash indictment and in support of motion offered the transcript, with papers annexed, filed in the office of the clerk under #75—Preliminary Examination on Jan. 28, 1916, which was ordered marked as "Defendant's Exhibit 1 on Motion to Quash."

Motion overruled.

An exception to the ruling being taken and allowed to the defendants.

Defendants' counsel then filed demurrer which was submitted without argument and overruled.

Geo. B. Grigsby, of counsel for defendants, then for and on behalf of the defendants entered a plea of not guilty, and also for and on behalf of each of said defendants entered the further plea of former acquittal for the crime charged in the indictment in the U. S. Commissioner's Court, Cape Nome Precinct, Second Division, Territory of Alaska, before James Frawley, Commissioner and Justice of the Peace, on the 8th day of January, 1916.

Written plea of former jeopardy then presented and filed.

By agreement of counsel trial of case set at 10 A. M. to-morrow, April 12, 1916. The case of United States vs. Gene Rose, being reset to follow this case.

Thereupon Court adjourned until 10 A. M. to-morrow, April 12, 1916. [7]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
ITZ, JOHN NOVOSEL, NICK SKORLICH,
ALFRED PIERSON, ADELBERT G.
GUMAER,

Defendants.

Demurrer to Indictment.

Come now the defendants in the above-entitled action by and through their attorneys George B. Grigsby and Hugh O'Neill and demur to the indictment herein filed on the following grounds:

First. That said indictment does not state facts sufficient to constitute a crime.

Second. That more than one crime is charged in said indictment.

Third. That two offenses are improperly joined in said indictment.

Fourth. That said indictment does not substantially conform to the requirements of Chapter 7 of Title XV of the Compiled Laws of Alaska.

Fifth. That there is a misjoinder of parties defendant in said indictment.

GEORGE B. GRIGSBY,

HUGH O'NEILL,

Attorneys for Defendants.

[Endorsed]: In the District Court, District of Alaska, Second Division. United States of America, Plaintiff, vs. Ed. Johnson et al., Defendants. Demurrer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 10, 1916. G. A. Adams, Clerk. By ———, Deputy F. W. L. [8]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, General 1916 Term, Beginning
January 29, 1916.

Tuesday, April 11, 1916, at 2 P. M.

Court convened pursuant to adjournment—
Honorable J. R. TUCKER, District Judge, presiding.

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Geo. B. Grigsby, of counsel for defendants, then for and on behalf of the defendants entered a plea of not guilty, and also for and on behalf of each of said defendants entered the further plea of former acquittal for the crime charged in the indictment in the U. S. Commissioner's Court, Cape Nome Precinct, Second Division, Territory of Alaska, before James Frawley, Commissioner and Justice of the Peace, on the 8th day of January, 1916.

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Thereupon Court adjourned until 10 A. M. to-morrow, April 12, 1916. [9]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, General 1916 Term, Beginning
January 29, 1916.

Tuesday, April 11, 1916, at 2 P. M.

Court convened pursuant to adjournment—
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ing.

Upon the convening of Court the following pro-
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1036C.

UNITED STATES

vs.

E. JOHNSON et al.

**Minutes of Court—April 11, 1916—Order Overruling
Motion to Quash Indictment, Pleas, etc.**

Defendants represented by counsel Geo. B. Grigsby and Hugh O'Neill. United States represented by F. M. Saxton, District Attorney.

Counsel for defendants moved to quash indictment and in support of motion offered the transcript, with papers annexed, filed in the office of the clerk under #75—Preliminary Examination on Jan. 28, 1916, which was ordered marked as "Defendant's Exhibit 1 on Motion to Quash."

Motion overruled.

An exception to the ruling being taken and allowed to the defendants.

Defendants' counsel then filed demurrer which was submitted without argument and overruled.

Geo. B. Grigsby, of counsel for defendants, then for and on behalf of the defendants entered a plea of not guilty, and also for and on behalf of each of said defendants entered the further plea of former acquittal for the crime charged in the indictment in the U. S. Commissioner's Court, Cape Nome Precinct, Second Division, Territory of Alaska, before James Frawley, Commissioner and Justice of the Peace, on the 8th day of January, 1916.

Written plea of former jeopardy then presented and filed.

By agreement of counsel trial of case set at 10 A. M. to-morrow, April 12, 1916. The case of United States vs. Gene Rose being reset to follow this case.

Thereupon Court adjourned until 10 A. M. to-morrow, April 12, 1916. [10]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
ITZ, JOHN NOVOSEL, NICK SKORLICH,
ALFRED PIERSON and ADELBERT G.
GUMAER,

Defendants.

Plea of Former Jeopardy.

Defendants, and each of them, by and through their attorneys George B. Grigsby and Hugh O'Neill,

each for himself pleads that he has already been tried for the crime charged in the indictment herein, in the United States Commissioner's Court for Cape Nome Precinct, Second Division, of the Territory of Alaska, by and before James Frawley, U. S. Commissioner and Ex-officio Justice of the Peace, on the 8th day of January, 1916.

GEORGE B. GRIGSBY,

HUGH O'NEILL,

Attorneys for Defendants.

[Endorsed]: In the District Court for the District of Alaska, 2d Division. United States of America, Plaintiff, vs. Ed. Johnson et al., Defendants. Plea of Former Jeopardy. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 10, 1916. G. A. Adams, Clerk. By —————, Deputy, F. W. L. [11]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
ITZ, JOHN NOVOSEL, NICK SKORLICH,
ALFRED PIERSON, ADELBERT G.
GUMAER,

Defendants.

**Motion for Order Appointing Special Officer to
Serve Venire for Additional Jurors, etc.**

Come now the defendants in the above-entitled cause and move the Court that a special officer be appointed to serve the venire for additional jurors about to issue herein on the ground that the United States Marshal and his deputies are not indifferent persons and are interested in the event of the above-entitled cause.

This motion is based upon the affidavit of Geo. B. Grigsby hereto attached and made a part hereof.

GEO. B. GRIGSBY,

HUGH O'NEILL,

Attorneys for Defendants. [12]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON et al.,

Defendants.

Territory of Alaska,
Second Division,—ss.

George B. Grigsby, being first duly sworn, deposes and says: That the above-entitled action came on for trial on the 12th day of April, 1916, in the above-entitled court and thereafter on the 14th day of April, 1916, resulted in a disagreement of the jury and was immediately set for retrial for the 17th day

of April, 1916: That on said previous trial of said case, one N. B. Nelson testified that on the 30th day of December, 1915, he was employed by E. R. Jordan, the United States Marshal for the Second Division, District of Alaska, to look up gambling in the town of Nome; That thereafter, pursuant to said employment, the said Nelson on five or six different evenings played "stud poker" for money in a place known as the Arctic Billiard Parlors—the last occasion of said playing being on the 5th day of January, 1916, that on said last-mentioned occasion, he, the said Nelson, played "stud poker" for money with certain of the defendants above named and during the progress of the game, left the place where the same was being carried on and reported the existence of the game to Deputy Marshal Phil Holland; that thereupon said Nelson returned to said Arctic Billiard Parlor and shortly thereafter said Phil Holland, together with said Chief Deputy Marshal A. B. Miller and Deputy Marshals Elmer Reed and Joel Terrell entered said place and arrested the defendants herein without warrant; that said E. R. Jordan testified at said former trial that he did employ the said N. B. Nelson as testified to by the said Nelson and paid him for his said services the sum of sixty-five dollars with money belonging to him personally; [13] that on the trial of said action one Perry Moore testified that shortly before the 25th of December, 1915, he heard the said Deputy Marshal Phil Holland say to defendant Ed. Johnson, "I am coming after you and I'm going to get you." That said E. R. Jordan and all of his deputy marshals above named were witnesses against the defendants on

said former trial, and with the exception of N. B. Nelson and the said deputy marshals above named there was no evidence offered by the Government tending to prove that the defendants or any of them played the games of cards mentioned in the indictments herein, nor any evidence whatever that said games were played for money, except the evidence of the said N. B. Nelson.

WHEREFORE affiant alleges that the said United States Marshal E. R. Jordan and his said deputies are not indifferent persons for the summoning of jurors herein as required by Sec. 803, R. S. That said prosecution originated in said Marshal's office without the complaint of any private citizen, and that by reason of the foregoing facts the said United States Marshal E. R. Jordan and his said deputies are unduly interested in the securing of a conviction herein.

GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 17th day of April, 1916.

[Notarial Seal]

D. B. CHACE,

Notary Public in and for the Territory of Alaska.

(My commission expires May 12, 1917.)

[Endorsed]: No. 1036C. In the District Court for the District of Alaska, Second Division. United States, Plaintiff, vs. Ed. Johnson et al., Defendant. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Apr. 26, 1916. G. A. Adams, Clerk. By ———, Deputy. Geo. B. Grigsby and Hugh O'Neill, Attorney at Law, Nome, Alaska, Attorney for Defendants. [14]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, General 1916 Term, Beginning
January 29, 1916.

Wednesday, April 26, 1916, at 10 A. M.

Court convened pursuant to adjournment—Honorable J. R. TUCKER, District Judge, presiding.

Upon the convening of the court the following proceedings were had:

1036C.

UNITED STATES

vs.

ED. JOHNSON et al.

Minutes of Court—April 26, 1916—Trial.

Roll-call of jurors showed all remaining members of the regular panel in attendance.

Defendants all present in person and by their counsel Messrs. Grigsby and O'Neill. United States represented by F. M. Saxton, District Attorney.

F. M. Saxton presented and filed stipulation between counsel for respective parties.

Names of jurors were placed in the box and regularly drawn therefrom as follows: O. A. Bourett, Otto Halla, David Leljerath, J. P. Britzius, Ed. Parker, D. B. Camp, and Walter Quigley.

Geo. B. Grigsby, counsel for defendants, then filed motion and affidavit for appointment of special officer to serve special venire. Motion overruled, defendants taking and being allowed an exception.

Special venire for twenty-five names, returnable at 10 A. M. to-morrow, ordered.

Chas. Mason, witness for whom subpoena had issued behalf of the Government, was present in court.

Geo. B. Grigsby, counsel for defendants, tendered two hundred and fifty (\$250) dollars as cash bail to secure the attendance of witness Mason at all times during further proceedings in this case and which said sum was also to operate as cash supersedeas bond in the case of United States vs. Chas. Mason et al., in event of defendants perfecting appeal.

Such cash sum accepted on foregoing conditions and then and there paid.

Whereupon Court adjourned until 10 A. M. to-morrow, April 27, 1916. [15]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK
KOBETITZ, JOHN NOVOSEL, NICK
SKORLICH, ALFRED PIERSON, ADEL-
BERT G. GUMAER,

Defendants.

Court's Instructions to the Jury.

GENTLEMEN OF THE JURY:

1.

The defendants are charged by the first count of the indictment in this case with dealing, playing,

carrying on, opening, causing to be opened and conducting a game called "stud poker," and by the second count of said indictment in this case with dealing, playing, carrying on, opening, causing to be opened and conducting a game called "Pangingi."

Section 2032 of the Compiled Laws of Alaska is the one under which this case is prosecuted. Each and every person who shall deal, play, carry on, or cause to be carried on, or conduct, either as owner, proprietor, or employee, whether for hire or not, any game played with cards, dice, or any other device, whether the same shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor.

To this indictment the defendants have entered a plea of not guilty and you are instructed that such plea puts the burden of proof upon the prosecution to establish every essential allegation of the indictment beyond reasonable doubt.

2.

There are seven defendants in this case and it becomes your duty to consider each one of them separately in relation to the crime charged under the evidence and instructions in this case. All or any number of them may be innocent or all or any number of them may [16] be guilty on one or both of the counts charged. That is for you to determine from the evidence under these instructions. And in determining the guilt or innocence of any one of these defendants, you should consider the evidence and these instructions in their relation to such defendant as if such defendant were the only defendant in the case. Hence when I have used the word

“defendant” in these instructions, you will understand that the same is used to represent each of the defendants when his guilt or innocence is under consideration by you.

3.

The essential elements of the crime of gambling are:

1st. That the game was played with cards, dice or other device;

2d. That such game was played for money, checks, chips, credit, or other representative of value;

3d. That the defendant was connected with such game as a dealer, player, owner, proprietor, or employee or lessee of the room in which such game was conducted;

4th. That said game was played in the Second Division of Alaska within three years prior to the date of filing the indictment in the case;

5th. That if defendant was not connected with such game as dealer, player, owner, proprietor or employee, but was the owner or lessee of the room in which the game was played, then that defendant knew that gambling was being conducted in said room.

4.

In a criminal cause the judge and jury of this court have important though separate functions to perform. It is your duty to hear all of the evidence and to decide thereupon all questions of fact. Sometimes it is attempted to introduce testimony which for legal reasons the Court refuses to permit. You will not consider any such matter or any knowledge or

information known to you concerning the case and not derived from evidence given upon the witness-stand in arriving at your verdict. It is the duty of the Judge of this court to instruct you upon the law applicable to the case and the statute makes it your duty to accept as law what is laid down by the Court as such in these instructions, and if you should knowingly refuse [17] to do so you would be liable as for contempt of court.

5.

Each of the defendants in this case is presumed to be innocent until he is proven guilty. If upon such proof there be reasonable doubt remaining the accused is entitled to the benefit of it by an acquittal. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after a full, free, and careful examination and comparison of all the evidence. It must be such a doubt as would cause a careful, considerate, and prudent man to pause and consider before acting in the careful and most important affairs of life. A certainty that convinces and directs the understanding and satisfies a reasonable judgment would be proof beyond reasonable doubt. If you believe as reasonable men you should not disbelieve as jurors.

This does not mean that every element of the crime charged must be proven by direct and positive evidence. Facts may be proven by indirect or circumstantial evidence, or may be a presumption arising from the facts proven. If you are satisfied beyond a reasonable doubt that your conclusion is correct that is sufficient whether based upon direct proof, indirect or circumstantial proof, or from a presump-

tion arising from other facts proven.

51½.

I instruct you that the testimony of one witness, if believed by you, is sufficient to establish any material fact in the case unless such witness is an accomplice. If you believe from the evidence that the witness, N. B. Nelson, was employed by the United States Marshal for this Division to engage in the apprehension of persons violating the law by gambling, and that in pursuance of said employment the said Nelson engaged in a gambling game, if any, with the defendants, then I instruct you that said Nelson is not an accomplice with the defendants, and you should give his testimony the same weight and consideration as you would have done if he had been present and had testified to the same matters without participating in the game.

On the other hand, if you believe from the evidence that the said witness N. B. Nelson was not employed by the United States Marshal or that he did not engage in the gambling game, if any, with the [18] defendants, for the purpose of apprehending them, then I instruct you that he was an accomplice and his testimony connecting the defendants with the game, if any, must be corroborated by some other evidence which tends to connect the defendants with the game. However, his testimony as to the character and elements of the game need not be corroborated even though he be an accomplice. In other words the testimony of an accomplice is sufficient, if you believe it, to establish that a certain game played with cards for money, checks, chips or credits of value was being played at a certain time and place,

without any corroboration whatever. But his testimony as to who was engaged in or connected with the game, if any, must be corroborated by some other evidence tending to connect the defendants with the game.

Hence, the testimony of said witness, N. B. Nelson, whether you find that he was an accomplice or not, if you believe it, is sufficient to establish the kind of a game that was being played, if any; the means or instrumentalities used in playing such game, if any; and the nature and value of the "stakes" for which such game was being played, if any. However, his testimony, if any, connecting the defendants with the game, must be corroborated as heretofore stated, in case you find him to be an accomplice, but not otherwise.

51½A.

The Government has introduced certain evidence in this case tending to show that the defendants were playing for certain chips on which the value in trade of each chip is printed. I instruct you that the printing on each of such chips is sufficient evidence to establish the value thereof, since no evidence has been introduced to explain or contradict the printing thereon.

6.

You are the sole judges of the credibility of witnesses and the weight to be attached to their testimony. This power is not to be exercised arbitrarily by you, but with reasonable discretion and in subordination to the rules of evidence. You may take into consideration the interest the witness has, if any, in the result of the trial, his bias or prejudice

if either, his mental capacity and his [19] means for knowing that about which he testifies, the reasonableness or unreasonableness of his statements, his demeanor on the witness-stand, his candor or evasion, and then applying your knowledge of human actions and motives you will determine where the truth lies and find accordingly.

You are instructed that you are not bound to find in conformity with the testimony of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

If you believe that any witness in this case has testified falsely in one part of his testimony you are at liberty to reject all of his testimony, but you are not bound to do so. You should reject the false part and may give such weight to other parts as you think they are entitled to receive.

6.

If you should find under the foregoing instructions that any of the witnesses in this case are accomplices, then I instruct you that the testimony of an accomplice ought to be viewed with distrust.

6 $\frac{1}{2}$.

You are instructed that the oral admissions of a party are to be viewed with caution.

6 $\frac{1}{2}$ A.

Our statute provides that in the trial of a criminal case, the person accused shall at his own request, but not otherwise, be deemed a competent witness, but if the defendant or accused waives his right to testify in the case, such waiver shall not create any presumption against him.

7.

The owner or lessee of a building or room can not lease or sublet such building or room for an unlawful purpose, or knowingly permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts transpiring in such building or room. If you should find from the evidence in this case that one of the defendants held the room in which gambling is alleged to have been conducted under a lease from the owner, and you [20] further find that gambling as alleged was being conducted there, then I instruct you that such owner or lessee is guilty if he knew that such gambling was being carried on there whether he had any connection with the game or not.

It follows therefore, that if you find gambling was being carried on in the room known as the Arctic Billiard-room or Parlor, and that said room was held by defendant under a lease from the owner either oral or written, then I instruct you that such defendant is guilty if he knew that such room was being used for the purpose of gambling, and a game of stud poker or pangingi played with cards for money or chips of value was had in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist.

Again if you find that a game of stud poker or pangingi was played with cards for money or chips of value on the night in question, in said room, and the defendant had anything to do with said game such as dealer, player, owner, proprietor or employee; then I instruct you that the defendant is guilty, and

it does not matter whether he was the lessee or owner of said room and had previous knowledge of said game or not.

8.

I have permitted evidence to be introduced in this case tending to show gambling to have been carried on in the room known as the Arctic Billiard-room at other times prior to the time alleged for the purpose of establishing the knowledge of the owner and lessee of said room that gambling was being carried on there, and you should consider it for no other purpose. As to what extent such testimony tends to show such knowledge on the part of defendant is for you to determine.

9.

There has been some testimony tending to show that the defendant, Ed. Johnson, has made statements to the effect that he intended to gamble in spite of law and the efforts of officials to stop him. You should consider this testimony only in determining the guilt or innocence of said defendant, Ed. Johnson. You should not consider [21] it as affecting the guilt or innocence of the other defendants.

9½A.

There have been some testimony tending to show that the defendant, Adelbert G. Gumaer, made an admission of his guilt in the presence of the witness, J. H. Young. You should consider this testimony only in determining the guilt or innocence of said defendant, Gumaer, and not as affecting the other defendants.

91½B.

The defendants have entered a plea of former conviction in this case, but there being no evidence admitted upon that plea, I instruct you that you are not to give the same any consideration.

10.

I submit to you three forms of verdict. If you should find all of the defendants guilty of both counts of the indictment you should return the verdict finding all of the defendants guilty as charged. If you should find that no one of the defendants is guilty of either count in the indictment, then you should return the verdict finding all of the defendants "not guilty." If you should find the defendants "guilty" of one count only of the indictment, and "not guilty" of the other count, or you should find some of the defendants guilty of both counts and the others not guilty of both, then you should return the third form of verdict filling in the names of the defendants whom you find guilty, if any, in your verdict on each count of the indictment in the blank space left for that purpose; and likewise filling in the names of the defendants not guilty in the blank space left for that purpose.

When you have retired to your jury room and have agreed upon your verdict, you should have your foreman, to be selected by yourselves, sign the one upon which you unanimously agree and return it into Court as your verdict in this case.

You may take into the jury-room for your guidance these instructions, the exhibits, and the indictment.

Let the bailiffs be sworn.

You may now retire, gentlemen, to deliberate upon your verdict.

J. R. TUCKER,

District Judge. [22]

[Endorsed]: 1036 U. S. vs. Ed. Johnson et al. Instructions to Jury. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Apr. 29, 1916. G. A. Adams, Clerk. By A., Deputy. [23]

Court's Remarks on Gambling Generally.

With respect to the offense of gambling generally, the Court will say that one of the counsel for defendants, going outside the evidence in this case, contrary to professional tradition and custom, inadvertently stated, *arguendo*, in excuse of the defendants, that United States senators and others in high positions in this country socially, and otherwise, gambled, and that this community has heretofore acquiesced in gambling; concede the truth of this statement, if you will, and yet it must be plain to every person of ordinary intelligence that it is no excuse in law or morals for the offense of gambling. As to whether gambling *per se* is morally wrong or not, the courts have no concern; that is a matter for each individual to decide for himself in the forum of his own conscience, but it is morally wrong to knowingly disobey the law, and Congress—the law-making power and representative legislative body of this country has forbidden gambling in the Territory of Alaska as the states forbid it outside, and the law should be enforced by the

courts and the people should obey it.

There is no question about the wisdom of the law against gambling. No fair-minded intelligent man may fail to recognize that it is a social evil, harmful to the individual, to society and to the commercial interest of this community, as it is to all communities, more or less. We have in Nome a fine lot of children and young people; they surely should be taught either by example or precept that gambling is wrong and harmful; I cannot believe there are parents in this town who would teach them otherwise. For their good especially, therefore, as well as for other reasons, gambling should be suppressed,—irrespective of the place in which it goes on or the persons who engage in it; and it may and should be stamped out root and branch in this community by the co-operation of the municipal and Federal authorities, backed up as they should be, by a strong public sentiment against it. When the authorities unite for the enforcement of the law and the intelligent public sentiment of the community upholds them, as it should do, juries will do their duty without fear or favor. [24]

J. R. TUCKER,

[Endorsed]: #1036. U. S. vs. Ed. Johnson, et al. Court's Remarks on Gambling Generally. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 5, 1916. G. A. Adams, Clerk. By —————, Deputy. [25]

Instructions to Jury to Return for Further Consideration.

Upon the evidence and instructions in this case you should be able to reach a verdict.

The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.

Now, I shall give you a longer time for a further and more serious consideration of this case. When you retire to the jury-room again read over the instructions of the Court carefully and if there is anything about them you do not understand so advise the Court and I will endeavor to make the same plain to you. It is your duty to arrive at a verdict in the case according to the evidence and the instructions given you irrespective of all other considerations and interest. You may now retire for further consideration of the case.

May 1, 1916.

J. R. TUCKER,
Judge.

[Endorsed]: 1036. U. S. vs. Ed. Johnson, et al. Instructions to Jury to Return for Further Consideration. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 1, 1916. G. A. Adams, Clerk. By A., Deputy. [26]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ,
JOHN NOVOSEL, NICK SKORLICH, ALFRED
PIERSON, ADELBERT
G. GUMAER,

Defendants.

Verdict.

We, the trial jury, duly empaneled to try the above-entitled cause, find the defendants Ed. Johnson, A. C. Laird, guilty as charged in the first count of the indictment, and the defendants Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson, Adelbert G. Gumaer not guilty on said first count.

And we further find the defendants *the defendants* Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson, Adelbert G. Gumaer not guilty on said second count.

W. LOERPABEL,

Foreman.

[Endorsed]: 1036-C. The District Court, District of Alaska, Second Division. The United States vs. Ed. Johnson et al. Verdict. Filed in the office of the Clerk of the District Court of Alaska, Second Divi-

sion, at Nome. May 1, 1916. G. A. Adams, Clerk.
By ———, Deputy. [27]

*In the District Court, District of Alaska, Second
Division.*

No. 1036.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBE-
TITZ, JOHN NOVOSEL, NICK SKOR-
LICH, ALFRED PIERSON, ADELBERT
G. GUMAER,

Defendants.

Judgment.

Now, at this time this cause coming on in open court for the passing of sentence and judgment in this case, the defendants, Ed. Johnson and A. C. Laird, appearing in person and by Geo. B. Grigsby and Hugh O'Neill, their counsel, and the United States appearing by F. M. Saxton, United States Attorney for the Second Division of the District of Alaska, and it appearing to the Court that heretofore on the 6th day of April, 1916, the grand jury returned and filed in the above-entitled court an indictment charging above-named defendants with the crime of gambling in two counts, and it further appearing that thereafter on the 8th day of April, 1916, said defendants appearing in person and by their said counsel in open court and were duly arraigned, and there-

after on the 11th day of April, 1916, the Court having overruled defendants' motion to quash and demurrer to said indictment the said defendants appeared in person and pleaded "not guilty" to said indictment, and thereafter on the 26th day of April, 1916, said cause coming on regularly for trial, and the said defendants appearing in person and by their said counsel, and a jury having been duly and regularly empaneled, and witnesses sworn and examined, and said cause having been argued by counsel, and said jury having been instructed by the Court, and said cause having been on the 29th day of April, 1916, submitted to said jury, and said jury thereafter on the first day of May, 1916, having returned against said defendants, Ed. Johnson and A. C. Laird, a verdict [28] of guilty of the crime charged in the first count of the said indictment, and the said Court at said time having fixed the 5th day of May, 1916, at 10 A. M. as the time for imposing sentence upon the said defendants, and the said time having now arrived, and the said defendants appearing in person and by their said counsel and interposing no reason why sentence should not now be pronounced;

IT IS NOW THEREFORE CONSIDERED, ORDERED, and ADJUDGED that the defendant, Ed. Johnson, be and he hereby is fined in the sum of five hundred dollars (\$500), and that the United States as plaintiff herein have judgment against the said defendant, Ed. Johnson, for the sum of said fine of \$500 and the costs of this action taxed at \$364.95, and that in default of the payment of said fine and costs the said defendant be imprisoned in the Federal

Jail at Nome, Alaska, one day for each two dollars thereof, not exceeding one year.

AND IT IS FURTHER CONSIDERED, ORDERED, AND ADJUDGED that the defendant, A. C. Laird, be and he hereby is fined in the sum of five hundred dollars (\$500), and that the United States as plaintiff herein have judgment against the said defendant, A. C. Laird, for the sum of said fine of \$500 and the costs of this action taxed at \$364.95, and that in default of the payment of said fine and costs the said defendant be imprisoned in the Federal Jail at Nome, Alaska, one day for each two dollars thereof, not exceeding one year.

IT IS FURTHER CONSIDERED, ORDERED and ADJUDGED that said judgments, including said fine and costs be docketed against each of the said defendants as in case of judgments in civil causes, and that plaintiff have execution therefor; that said judgments for costs shall be joint and several against the said defendants.

IT IS FURTHER ORDERED that said defendants be, and they hereby are, remanded to the custody of the United States Marshal [29] for the Second Division of Alaska for the execution of these judgments.

And it further appearing to the Court that the United States Marshal for this Division did take from the possession of said defendants at the time at which the crime was committed upon which the said defendants have been convicted, and from the room in which said crime was committed, then and there being used by the defendants in gambling, the

following described gambling implements, to wit:

- 1 deck of cards, being Plaintiffs' Exhibit "A" herein;
- 1 bunch of chips, being Plaintiffs' Exhibit "B" herein;
- 8 decks of cards, being Plaintiffs' Exhibit "C" herein;
- 1 bunch of chips, being Plaintiffs' Exhibit "D" herein;
- 1 box cards and chips, Plaintiffs' Exhibit "E" herein;
- 1 stud poker-table, Plaintiffs' Exhibit "F" herein;
- 1 Panginge table, Plaintiffs' Exhibit "G" herein;

IT IS THEREFORE FURTHER CONSIDERED, ORDERED, and ADJUDGED THAT THE United States Marshal for the Second Division of the District of Alaska be and he hereby is authorized and directed to destroy the said gambling implements and all thereof, and a certified copy of this order shall be his authority and warrant for so doing.

Dated at Nome this 5th day of May, 1916.

J. R. TUCKER,

District Judge. [30]

#1036—Crim. The District Court, District of Alaska, Second Division. The United States vs. Ed. Johnson et al. Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. J. D. #3, page #11. Orders and Judgments, Vol. 11, page 232, C. [31]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ,
JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON and
ADEL-BERT G. GUMAER,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the 11th day of April, 1916, at a regular term of this court held in and for the Second Division, Territory of Alaska, at the courthouse of Nome, Alaska, the motion to quash the indictment in the above-entitled cause and the demurrer of said defendants to said indictment, each coming on regularly to be heard, the United States appearing by F. M. Saxton, and the defendants, and each of them, appearing in person and by George B. Grigsby and Hugh O'Neill, their attorneys, and the Court having overruled and denied said motion and demurrer, to which rulings of the Court the defendants then and there excepted and said exceptions having been then and there allowed;

AND IT BEING FURTHER REMEMBERED that on the 12th day of April, 1916, at said regular term of court the said above-entitled cause of the United States of America versus the above-named

defendants coming on regularly for trial before the Honorable J. R. TUCKER, Judge of said court, and a jury, the United States appearing by F. M. Saxton and the defendants appearing in person and by George B. Grigsby and Hugh O'Neill, their attorneys, the defendants, and each of them, entered a plea of not guilty and also a plea of former jeopardy;

AND BE IT FURTHER REMEMBERED that thereupon a jury was duly sworn and empaneled to try said above-entitled cause, and evidence having been submitted on the part of the Government and [32] upon the part of the defendants, and the case having been argued to the jury, and the Court having instructed the jury in writing, thereupon the jury retired and thereafter, on the 14th day of April, 1916, the jury having reported that it was unable to agree upon a verdict, was then and there discharged and said cause was then and there, on said 14th day of April, 1916, reset for trial for Monday, April 17th, at 10 o'clock A. M. [33]

BE IT FURTHER REMEMBERED that on the 17th day of April, 1916, at a regular term of the above-entitled court begun and held at Nome, in the Territory of Alaska, Second Division, the said above-entitled cause of the United States of America versus Ed. Johnson et al., coming on regularly for trial before the Honorable J. R. TUCKER, Judge of said court, and a jury, the United States appearing by F. M. Saxton, United States District Attorney, and the defendants appearing in person and by George B. Grigsby and Hugh O'Neill, their attorneys, thereupon the following proceedings were had, to wit:

F. M. Saxton, U. S. District Attorney, moved the Court to continue the case until the next day, the 18th of April, 1916, at the hour of 10 o'clock A. M., said motion being based upon the ground of the absence of three witnesses, Charles Mason, A. Hanson and Elmer Adams, whom the District Attorney said were competent and material witnesses without whom he could not proceed to trial. George B. Grigsby objected to any continuance of the case. The Court overruled the objection and continued the case until Tuesday, April 18th, 1916, at 10 o'clock A. M., to which ruling defendants excepted and said exception was allowed.

Thereupon pursuant to adjournment proceedings were resumed at 10 o'clock Tuesday morning, April 18th, 1916.

F. M. Saxton moved the Court that the case be continued until the next day at 10 o'clock A. M. on the ground that the United States was unable to find the witnesses previously referred to. Whereupon the following proceedings were had:

Mr. O'NEILL.—I think the District Attorney should be compelled to set this case far enough ahead so he can get his witnesses here.

The COURT.—I don't care to hear any argument in this case. As long as there is any possibility of finding these witnesses I am going to continue this case over from day to day and that possibility will be determined by the information I get from the District Attorney. [34].

To which ruling the defendants excepted and an exception was allowed.

Whereupon court adjourned until Wednesday morning April 19th, 1916, at 10 o'clock.

Thereupon pursuant to adjournment proceedings were resumed at 10 o'clock Wednesday morning, April 19th, 1916, as follows:

F. M. Saxton moved the Court for a further continuance of the case and until the next day at 10 o'clock A. M. on the ground that the marshal reported that he was still unable to find the missing witnesses. Defendants objected to a continuance of the case, which objection was overruled by the Court, to which ruling the defendants excepted and an exception allowed.

Whereupon Court adjourned until Thursday morning April 20th, 1916, at 10 o'clock.

THEREUPON pursuant to adjournment proceedings were resumed at 10 o'clock A. M. Thursday, April 20th, 1916, as follows:

Mr. SAXTON.—If the Court please I ask at this time that the case be continued until to-morrow morning at 10 o'clock for the reasons that have been assigned.

Mr. GRIGSBY.—We object to any continuance.

The COURT.—We will adjourn until to-morrow morning at 10 o'clock.

To which ruling of the Court defendants excepted and an exception allowed.

Whereupon court adjourned until Friday morning, April 21st, 1916, at 10 o'clock.

THEREUPON pursuant to adjournment proceedings were resumed at 10 o'clock A. M. Friday April 21st, 1916, as follows:

F. M. SAXTON.—I move the Court that the case go over until Monday morning at 10 o'clock.

Defendants objected to any continuance of the case which objection was overruled, to which ruling the defendants excepted and [35] an exception allowed. Whereupon court adjourned until Monday morning April 19th, 1916, at 10 o'clock.

THEREUPON, pursuant to adjournment, proceedings were resumed Monday morning, April 24th, 1916, at 10 o'clock as follows:

Mr. SAXTON.—If the Court please I will have to report the same condition this morning and I will ask the case to go over until Wednesday morning at 10 o'clock.

Mr. GRIGSBY.—Now if the Court please, there has been no showing made by the District Attorney to the effect that defendants are in any way at fault in this matter, or their counsel, and these defendants have been here every day for seven days. They are indicted, they are presumed to be innocent, they are not culprits, they should not be held up to the community as culprits, they have a right to a speedy trial unless there is some ground for refusing them. In any event they should not undergo the hardship of being hauled up here day after day. When this case is continued for a day it is continued for trial and they have to be here. Now the District Attorney should show the Court when he will be ready and not continue this case indefinitely. He has made no showing whatever in the premises. It looks very much as if there was an attempt to punish these defendants who have not been convicted of anything because the State

has not got these witnesses. I very much doubt if your Honor has any jurisdiction to compel them to attend court day after day in the absence of any showing. The District Attorney hasn't shown he will be ready, that he expects to be ready, or taken steps that he can be ready and he should not ask to have this case set for a day when he don't know whether he will be ready for trial or not. Let him announce the day he will be ready. We have some rights, legal rights. Supposing on the part of the defendants I came [36] up here and say, "I cannot get my witnesses, they are hiding somewhere," would your Honor grant a continuance indefinitely from day to day to these defendants? We have as much right as the prosecution in that regard and we insist at this time that this trial proceed this morning.

The COURT.—The case will go over until Wednesday morning at 10 o'clock.

Mr. GRIGSBY.—I wish to make a motion in this case. The defendants, and each of them, move that this prosecution be dismissed for the reason that defendants have not been accorded a speedy trial in accordance with their constitutional rights and we object to any continuance.

The COURT.—Motion overruled.

To which ruling of the Court defendants excepted and an exception allowed.

Whereupon the Court adjourned until Wednesday morning at 10 o'clock April 26th, 1916.

THEREUPON pursuant to adjournment proceedings were resumed at 10 o'clock Wednesday, morning, April 26th, 1916.

Whereupon the following jurors were drawn from the box: A. O. Bourette, Otto Halla, David Leljerath, J. P. Britzius, Ed Parker, D. B. Camp and Walter Quigley. The panel being exhausted the court ordered that a special venire issue for twenty-five jurymen returnable April 27th, 1916, at 10 o'clock A. M.

Whereupon the following proceedings were had:

Mr. GRIGSBY.—If the Court please, I think that number will be sufficient but before issuing the venire I have a motion to make which is as follows: [37]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT G. GUMAER.

**Motion for Order Appointing Special Officer to
Serve Venire for Additional Jurors, etc.**

Come now the defendants in the above-entitled cause and move the Court that a special officer be appointed to serve the venire for additional jurors about to issue herein on the ground that the United States Marshal and his deputies are not indifferent persons and are interested in the event of the above-entitled cause.

This motion is based upon the affidavit of Geo. B. Grigsby hereto attached and made a part hereof.

GEO. B. GRIGSBY,

HUGH O'NEILL,

Attorneys for Defendants. [38]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON et al.,

Defendants.

Affidavit of George B. Grigsby.

Territory of Alaska,

Second Division,—ss.

George B. Grigsby, being first duly sworn, deposes and says:

That the above-entitled action came on for trial on the 12th day of April, 1916, in the above-entitled court and thereafter on the 14th day of April, 1916, resulting in a disagreement of the jury and was immediately set for retrial for the 17th day of April, 1916.

That on said previous trial of said case one N. B. Nelson testified that on the 30th day of December, 1915, he was employed by E. R. Jordan, the United States Marshal for the Second Division, District of Alaska, to look up gambling in the town of Nome; that thereafter, pursuant to said employment the said Nelson on five or six different evenings played "stud poker" for money in a place known as the Arctic

Billiard Parlors, the last occasion of said playing being on the 5th day of January, 1916; that on said last-mentioned occasion he, the said Nelson, played "stud poker" for money with certain of the defendants above named and during the progress of the game left the place where the same was being carried on and reported the existence of the game to Deputy Marshal Phil Holland; that thereupon said Nelson returned to said Arctic Billiard Parlor and shortly thereafter said Phil Holland, together with said Chief Deputy Marshal A. B. Miller and Deputy Marshals Elmer Reed and Joel Terrell entered said place and arrested the defendants herein without warrant; that said E. R. Jordan testified [39] at said former trial that he did employ the said N. B. Nelson as testified to by the said Nelson and paid him for his said services the sum of sixty-five dollars with money belonging to him personally; that on the trial of said action one Perry Moore testified that shortly before the 25th day of December, 1915, he heard the said Deputy Marshal Phil Holland say to defendant Ed. Johnson, "I am coming after you and I'm going to get you." That said E. R. Jordan and all of his deputy marshals above named were witnesses against the defendants on said former trial, and with the exception of N. B. Nelson and the said deputy marshals above named, there was no evidence offered by the Government tending to prove that the defendants or any of them, played the games of cards mentioned in the indictments herein, nor any evidence whatever that said games were played for money, except the evidence of the said N. B. Nelson.

WHEREFORE affiant alleges that the said United States Marshal E. R. Jordan and his said deputies are not indifferent persons for the summoning of jurors herein as required by Sec. 803 R. S. That said prosecution originated in said marshal's office without the complaint of any private citizen, and that by reason of the foregoing facts the said United States Marshal E. R. Jordan and his said deputies are unduly interested in the securing of a conviction herein.

GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 17th day of April, 1916.

[Seal]

D. B. CHACE,

Notary Public in and for the Territory of Alaska.

[40]

Mr. GRIGSBY.—The section this motion is made under, if the Court please, is Section 803 of the Revised Statutes. (Reads.) Now I will state to the Court that I have looked this matter up quite thoroughly and the authorities go so far as to hold that when the United States Marshal is the prosecuting witness in a criminal case that he is disqualified from serving the venire. When he has an opinion of the guilt of the accused even, he is disqualified from summoning the venire. Now in this case the disqualification is more apparent than in any case I have been able to find. The only witnesses, with the exception of Nelson, are the marshal and deputy marshals. Nelson was hired by the United States Marshal, not with money belonging to the marshal furnished for that purpose, but with his own money, showing a

direct personal interest on the part of the marshal, Emmet R. Jordan, in the hiring of his so-called detective. The raid was made by the other deputy marshals without warrant, not on the complaint, as is usual, of two citizens who have been injured, showing that the prosecution wholly and entirely originated in the marshal's office. Now necessarily it must be apparent that if the marshal's office takes enough interest in the enforcement of any particular law, then naturally he would do all he could to secure a conviction. It would be different if a private citizen made a complaint, charging them with a misdemeanor or felony. (Argument.) Necessarily, according to all the laws of human nature he is interested in the success of it, throughout all the stages of the prosecution, and I assure the Court that it is my conviction that under the law he is disqualified from serving the venire. The statutes provide what should be done in such cases, to appoint some disinterested citizen and qualify him by oath to fill this panel.

Mr. SAXTON.—If the Court please, I have serious doubts as to the application of that law to this case or any other case in Alaska, as our statute provides for the issuing of a special venire for the jury without saying anything about appointing some disinterested citizen. It seems it shall be served by the marshal, but irrespective of that fact, taking these facts as shown by the affidavit, I [41] believe that it simply recites the testimony that was shown in this case. Now it seems to me a remarkable position to take that the marshal in this case is an interested person simply because he is doing his duty as a marshal.

Now, as your Honor well knows, the marshal's office should be active. It isn't his duty to sit down and wait until he is driven by a warrant or some proceeding of court before he acts but it is just as much his duty if he knows where a crime has been committed to investigate, and it is his duty to arrest, without a warrant. The law gives him that right and that privilege and the fact that these deputies went without a warrant is no evidence of any such interest in a case as would disqualify him from acting as an officer in the case, and the fact that he, out of his own private funds, employed a detective to investigate gambling, that doesn't show any animus against these defendants. It simply shows his interest as an officer in carrying out the law, seeing that it is enforced in his jurisdiction. As the facts show it was against gambling generally and there isn't one particle of evidence that the marshal is prejudiced against any one of these defendants. (Argument.) I am rather surprised that counsel should take this position in the matter. It does not seem to me that this community and this court can afford to take the position that when a man wants to do his duty and active in doing it, that that disqualifies him from performing the duties of his office. It certainly should not and does not as a proposition of law. (Argument.) If it was a case in which the marshal was financially interested in some way, as a civil case in which he was a party, then there would be some grounds for this position, but just because he has a little more zeal to enforce the law than perhaps some other marshals have had, or some other officials have had, certainly should not dis-

qualify him in the eyes of this court, or in the eyes of this community, to perform the usual and ordinary duties of his office. So I maintain that this motion should be overruled and that the marshal should serve this venire.

Mr. GRIGSBY.—If the Court please, I don't care to argue this much farther. I don't contend that the showing made showed any [42] personal animus at all, such is not necessary. The point is whether, under the circumstances as related in the affidavit, it isn't common sense to believe that the marshal is interested in securing a conviction in this case more than in an ordinary criminal case. (Argument.) The statutes with regard to the issuance of venires for jurors in Alaska are no different than in other states. In any state where the marshal is disqualified for any cause, a disinterested party is appointed. It is nothing unusual, it has been done before in this court and there is no showing before the Court except the facts in the affidavit which must be conceded as true, every one of them. It is not contradicted. The marshal went down in his pocket and paid N. B. Nelson personally. Does the marshal want to secure a conviction or is he absolutely indifferent as in an ordinary case he should be to be qualified? (Argument.) Now such facts do absolutely disqualify him. Under that statement I am willing to take a ruling of the court.

The COURT.—I overrule the motion.

To which ruling the defendants excepted and an exception was allowed.

Whereupon court adjourned until 10 o'clock Thursday morning, April 27th, 1916.

THEREUPON pursuant to adjournment proceedings were resumed at 10 o'clock Thursday morning, April 27, 1916.

The United States Marshal made return of the special venire which was returnable at this hour with the following named persons as having been served and all answered present at roll-call: Alfred Anderson, W. C. Bain, H. P. Breen, John Caldwell, E. W. Carleton, A. A. Chagnon, W. R. Hayes, Carl Hereim, Thos. Hull, G. R. Jackson, Robert James, Edw. Johnson, John Little, Wm. Loerpabel, J. G. McDougal, W. H. Pearson, Henry Peterson, C. F. Rice, Clarence Riggs, Davis Runyan, Harold Stokes, J. Sundback, Nels Swanberg, Geo. T. Watson and J. H. Young.

The names of the special venire were deposited in and regularly drawn from the box in the following order: H. P. Breen, John Caldwell, G. R. Jackson, Wm. Loerpabel and John Little. [43]

The twelve prospective jurors having been duly sworn the following jurors were examined as to their qualifications and passed for cause: O. A. Bourette, Otto Halla, David Liljerath, J. P. Britzius, Ed. Parker, D. B. Camp and E. W. Quigley.

H. P. Breem, John Caldwell and G. R. Jackson on examination were excused for cause and A. A. Chagnon, Geo. T. Watson and Edw. Johnson were drawn to fill their places on the jury.

Wm. Loerpable, John Little, A. A. Chagnon and George T. Watson were then examined as to their qualifications and passed for cause.

On examination Edw. Johnson was excused for cause.

Thos. Hull was then called on the jury and after examination was passed for cause.

Thereupon Ed Parker was excused on peremptory challenge of plaintiff.

Thereupon W. P. Pearson was drawn and called on the jury and being duly sworn testified as follows touching his qualifications to act as a trial juror in said cause:

Direct Examination.

Q. (By Mr. SAXTON.) You are a resident of Nome? A. Yes, sir.

Q. And a citizen of the United States?

A. Yes, sir.

Q. Do you know any of these defendants?

A. I just know a couple of them by sight.

Q. Which one?

A. Ed. Johnson and the other fellow there.

Q. The gentleman sitting next to him?

A. No, sir, this other fellow.

Q. Do you know anything about this case?

A. Only what I have heard.

Q. Have you heard what purports to be the facts?

A. No, sir.

Q. Did you talk with any of the witnesses?

A. No, sir. [44]

Q. Just general talk then? A. Yes, sir.

Q. Did you form any opinion as to the guilt or innocence of the defendants from what you heard?

A. Yes, sir.

Q. You are pretty busy are you not?

A. Well not so awful busy just now.

Q. You have acted as a juror in a trial criminal case before? A. No, sir.

Q. You understand it would be your duty as a juror, and you would take an oath if accepted as a juror that you would try the case upon the testimony as produced here? A. Yes, sir.

Q. Now could you lay aside anything you have heard or any opinion you may have and try the case upon the evidence and totally disregard any opinion you may have? A. Yes, sir.

Q. You could do that? A. Yes, sir.

Q. And you would do that if accepted as a juror?

A. Yes, sir.

Q. You wouldn't let what you have heard affect your verdict in any way? A. No, I would not.

Q. You understand that the defendants are presumed to be innocent. When you start out in the trial of a case the defendants are presumed to be innocent, that is the law. You understand that is the law?

A. Yes, sir.

Q. And you would give the defendants the benefit of that presumption? A. Yes sir.

Q. And you have no prejudice against prosecutions for gambling, have you? [45] A. No, sir.

Q. You would return a verdict of guilty if the evidence showed the defendants committed the offense? A. Yes, sir.

Q. There would be no tendency on your part to excuse a man for this offense than for any other?

A. No, sir.

Q. It would just simply be a question of what the

law is and the evidence given you by the witnesses as to whether the defendants committed this offense or not? A. Yes, sir.

Q. You are not aware of any reason why you would not be a fair and impartial juror?

A. No, sir.

Mr. SAXTON.—Pass the juror for cause.

Cross-examination.

Q. (By Mr. GRIGSBY.) You have an opinion at this time as to the guilt or innocence of the defendants? A. Yes, sir.

Q. Is that a fixed opinion?

A. Why, yes, to a certain extent.

Q. And one that would require evidence to remove? A. Yes, sir.

Q. And that opinion is based upon what you have been told was the evidence in the former trial?

A. From what I have heard.

Q. As to the evidence in the former trial?

A. No, I haven't heard any of the evidence.

Q. You have been told what the evidence was?

A. Well, I don't think I have. I haven't talked with any one.

Q. You have been told the facts in the case?

A. No, sir.

Q. Well, from what did you form your opinion?

A. From the general opinion of the town. [46]

Q. From conversations with other people?

A. From conversations.

Q. Impressions of other people? A. Yes, sir.

Q. And so if you went into the trial of this case you already have quite a strong opinion as to the

guilt or innocence of the defendants?

A. Yes, sir.

Q. Which would remain with you unless evidence was introduced to change it? A. Yes, sir.

Q. And if there wasn't evidence introduced to change it, it would affect your judgment?

A. If it wasn't changed it certainly would.

Q. So that would necessarily affect your verdict, would it not? A. Yes, sir.

Q. Unless there was some evidence in the case strong enough to change your present opinion your verdict would be affected by your opinion?

A. Yes, sir.

Mr. GRIGSBY.—We challenge the juror for cause.

(Questions by the COURT.)

Q. Mr. Pearson, you didn't hear any of the evidence in this case in court? A. No, sir.

Q. Have you talked with any of the witnesses who testified in this case? A. No, sir.

Q. Just talked generally with people outside?

A. Yes, sir.

Q. Is your opinion a fixed opinion, or just an impression?

A. It is—I would call it a fixed opinion.

Q. Do you think that opinion can be removed?

A. Oh, yes. [47]

Q. You think you could prepare to go into the jury-box and give the defendants a fair, just and impartial trial without regard to any opinion or the impressions you have? A. Yes, sir.

Q. According to the evidence? A. Yes, sir.

Q. You will swear to that? A. Yes, sir.

Q. And throw aside all these impressions, everything that has been said to you? A. Yes, sir.

Q. And give the defendants a fair, just and impartial trial? A. Yes, sir.

The COURT.—I think the juror is competent.
(Questions by Mr. GRIGSBY.)

Q. You say, Mr. Pearson, that that opinion would require some evidenc^e to remove? A. Yes, sir.

Q. And that if no evidence was offered having a tendency to change your present opinion then your present opinion would affect your verdict?

A. I don't know as I just understand you.

Q. Well, you have an opinion now as to the guilt or innocence of the accused? A. Yes, sir.

Q. Which would require evidence to change?

A. Yes, sir.

Q. Now, if no evidence was offered having a tendency to change your present opinion then your present opinion would affect your verdict?

A. Yes, sir, if there was no evidence to change it.

Q. In other words, if that opinion should be that the defendants are guilty you would have to have evidence put in in their [48] behalf in order to lay aside your opinion.

Mr. SAXTON.—If the Court please, I object to that.

Mr. GRIGSBY.—I suppose that it was that way.

Mr. SAXTON.—I know that is what you suppose. I don't think he has any right to inquire.

Mr. GRIGSBY.—I withdraw the question.

Q. If that opinion of yours should be that the

defendants are innocent then the Government would be required to put in some evidence to change that opinion?

Mr. SAXTON.—We object to that as just another way of trying to find out what the juror's opinion is.

Mr. GRIGSBY.—The answer is susceptible of being answered by yes or no.

The COURT.—Answer the question.

A. Yes, there certainly would have to be evidence to remove that.

Q. No matter which way the opinion is?

A. No matter which way the opinion is.

Q. So in the absence of evidence offered either for or against the defendants then your present opinion would affect your verdict? It would remain with you and affect your verdict?

A. No I don't know as it would.

Q. Didn't you say so awhile ago?

A. Well there would have to be evidence to change that. I would go according to the evidence given on the stand by the witnesses.

Q. You are not very anxious to sit on this case?

A. No, sir.

Q. You prefer not to? A. Yes, sir.

Q. Are you the Jury Commissioner of this court?

A. No, sir.

Q. You are not? A. No, sir. [49]

Q. How long have you known Ed. Johnson?

A. Oh, I have never known him personally, just know him to speak to him when I meet him on the street, I don't know how long I have known him.

Q. Did you know him when you were on the city council? A. I don't know as I did.

Q. Have you any bias or prejudice for or against Johnson? A. No, sir.

Q. Have you any prejudice against gambling aside from it being a crime?

Q. Yes, sir, I have. I am prejudiced against gambling.

Q. Have you any opinion as to the general reputation of any of the defendants as to being gamblers? A. Only what I have heard.

Q. Well that is the way you get reputations, you know. Have you any opinion as to their reputation from what you have heard?

A. Yes, I must say I have.

Q. And would that opinion as to their reputation affect the amount of evidence you would require?

A. No, I don't know as it would.

Q. Now what do you mean by a fixed opinion, Mr. Pearson? You say your opinion is a fixed opinion.

A. Well, if there is nothing comes up to change it.

Q. Then you are in a state of mind where you could already render a verdict if nothing came up to change your opinion? A. Yes, sir.

Q. You think your knowledge of the reputation of some of these defendants might affect you in passing on the case?

A. I don't know, I don't know as it would.

Q. Now supposing, Mr. Pearson, the evidence should show that these defendants were found with cards and chips on the table in the act of playing some game,—Mr. Johnson for instance,—and sup-

posing somebody walked in on Mr. Saxton [50] in the same predicament. Would you require any more evidence to prove that Mr. Johnson was playing for money than you would that Mr. Saxton was, or less? A. No, sir.

Q. You would require the same amount of evidence? A. Yes, sir.

Q. There would be no presumption in your mind against Mr. Johnson? A. No, sir.

Q. You know Mr. Saxton, don't you?

A. Yes, sir.

Q. You are a member of the same church?

A. Yes, sir.

Q. Have any social relations with him?

A. Only just in a general way.

Q. Do you sing together in the same performances? A. Yes, sir.

Q. And are you in this next attraction that is coming off? A. Yes, sir.

Q. With Mr. Saxton? A. Yes, sir.

Q. And you will sing together the same lullabys?

A. I don't think you would call it hardly that.

Q. Do you like his voice?

A. Fairly well, yes, sir.

Q. Do you think on account of that friendship and association with him, it would have a tendency to make you favor the Government?

A. No, I don't think it would.

Q. You think if you went on that jury and returned a verdict of not guilty you could unhesitatingly go up to those rehearsals and join in the chorus? A. Yes, sir.

Q. It wouldn't affect you at all? [51]

A. No, sir.

Q. Now you are sure you have a fixed opinion as to the guilt or innocence of some of the defendants. I will ask you if you was charged with the crime of gambling if you would be satisfied to be tried by a juror in your present frame of mind as regards this case? A. Well, no, I don't think I would.

Q. Do you think it would be fair to be tried by jurors in your present frame of mind? A. No, sir.

Q. Supposing every juror on this panel had your opinion in this case, do you think that these defendants would have a fair trial? A. Well—

Q. Would you call that a fair trial?

A. If they go strictly according to the evidence.

Q. You know better than anybody what your frame of mind is. A. I think I would.

Q. Supposing every juror here had your present fixed opinion relating to the guilt or innocence of these defendants, and you were the defendant, would you be satisfied to be tried by that kind of a jury?

A. I would if I could prove I was innocent.

Q. If you could prove you were innocent?

A. Yes, sir.

Q. So the burden would be on you, the defendant, to prove your innocence. Do you consider the defendant should be required to prove he is innocent?

A. No, sir.

Q. Well you are in a state of mind, so far as regards this case, Mr. Pearson, where the defendants are called upon to prove their innocence to change your mind, aren't they?

A. Well, no, I don't think so. [52]

Q. Well he has got to offer some evidence opposed to your present opinion? A. Yes, sir.

Mr. GRIGSBY.—We renew the challenge, if the Court please.

Mr. SAXTON.—I just want to ask the juror one question.

Q. (By Mr. SAXTON.) You say you have an opinion from what you have heard about the case. Now the question is whether or not you can lay that opinion aside and try this case wholly upon the evidence that is produced upon the witness-stand under the instructions of the court and totally disregard any opinion you may now have? A. Yes, sir.

Q. You could do that? A. Yes, sir.

Q. And will do that if accepted as a juror?

A. Yes, sir.

Mr. SAXTON.—I think the juror is competent. (Questions by the COURT.)

Q. The law presumes that a man is innocent until he is proven guilty of a crime beyond a reasonable doubt. Are you satisfied in your own mind you can go into the jury-box with the presumption?

A. Yes, sir.

Q. And give the defendants a fair, just and impartial trial on the evidence? A. Yes, sir.

Mr. GRIGSBY.—If the Court please, the juror can answer those questions propounded by the court which are the general questions as to the qualifications of jurors which conditions must be fulfilled to qualify him, [53] but to ascertain his real state of mind one must go a good deal further than to ask

him those questions. Now a careful examination of the juror must convince anyone that if all jurors were in his state of mind the defendants could not have a fair trial. Now there are plenty of jurors here probably without any opinion in the case. We feel that we should be tried by jurors without any present opinion, if possible. The Court has large discretion in this matter and we think the Court should exercise his discretion in sustaining this challenge as to Mr. Pearson. Mr. Pearson has an opinion which will abide with him unless evidence is offered to remove it. He has even stated that defendants could get a fair trial before a jury composed of jurymen like him if he could prove he was innocent. This shows his state of mind more than the questions propounded by the Court. The court put it up to the juror: "If sworn as a juror can you lay aside any opinion you may have and try this case wholly upon the evidence that is produced upon the witness-stand and the instructions of the Court and disregard everything else, if sworn to do so?" and he says "Yes," because that is his duty as a citizen to do it. He may think he can do it but when you examine him as to his state of mind he shows himself to be in such a state of mind that he cannot do that, notwithstanding he qualifies under the Court's questions. We don't think we could get a fair trial with jurors in that state of mind. He says he has an opinion which would require evidence to change. That disqualifies him clearly.

Mr. SAXTON.—If the Court please, it is true that some of the juror's answers, notwithstanding

the technical terms and court procedure, are somewhat inconsistent with his statement that he could try the case and disregard the opinion that he now has. The fact that it requires some evidence [54] to remove this opinion doesn't disqualify him. Now the juror didn't go into the nicety of the question as to who introduces the testimony. If the Government fails to make out a case it means the same thing to the juror as if the defendant proves himself innocent. I say he don't distinguish,—I think that is apparent,—those niceties that lawyers do in the matter. He has stated that he recognizes that the defendants are presumed to be innocent. Of course when you start in on the trial that presumption exists in his mind. Now he has an opinion and he says that he can lay that aside and try the case fairly upon the evidence as introduced, totally disregarding the opinion that he has and that is all the statute requires. Whenever he satisfies your Honor he can do that, and will do that, that shows him qualified.

Whereupon the Court overruled the challenge, to which ruling the defendants excepted and an exception allowed.

Whereupon defendants excused the juror Pearson peremptorily.

Whereupon Nels Swanberg was called, sworn, examined and excused for cause.

Whereupon Harold Stokes was called, sworn, examined and excused for cause.

Whereupon W. R. Hayes was called, sworn, examined and passed for cause.

O. W. Bourrette was then excused on peremptory

challenge of plaintiff.

E. W. Carleton was then called, sworn, examined and excused on peremptory challenge of defendant.

Whereupon J. G. McDougal was called, sworn and examined and passed for cause.

Whereupon Otto Halla was excused on peremptory challenge of plaintiff. [55]

Whereupon Clarence Riggs was called, sworn, examined and passed for cause.

Whereupon George Watson was excused on peremptory challenge of defendants.

Whereupon Carl Hereim was called, sworn, examined and excused for cause.

Whereupon Henry Peterson was then called, sworn, examined and passed for cause.

The jury being completed the following proceedings were had:

Mr. GRIGSBY.—At this time in view of the Court overruling my challenge to the juror Pearson, the defense offers to exercise another peremptory.

The COURT.—Overruled.

To which ruling the defendants excepted and an exception allowed.

Whereupon the following jurors were sworn to try the case: Wm. Loerpabel, John Little, David Leijerath, J. P. Britzius, D. B. Camp, W. Quigley, A. A. Chagnon, Thomas Hull, W. R. Hayes, J. C. McDougal, Clarence Riggs and Henry Peterson.

F. M. Saxton stated plaintiff's case to the jury, defendants waiving any statement. Whereupon the following proceedings were had:

Testimony of Philip Holland, for the Government.

PHILIP HOLLAND, a witness called on behalf of the prosecution, having been duly sworn, testified as follows:

My name is Philip Holland. I am a United States Deputy Marshal. Have held that position since July, 1914. I was deputy marshal on the 5th of January of this year. I recall the defendants in this case being arrested. It was on January 5th, 1916, on Wednesday, in the building on Front Street now known as the Arctic Billiard Parlors. The arrest was made on the ground floor in the back end of the building in the billiard-room. There is a billiard and pool table [56] in there. There is a partition between that room and the cigar-store with swinging doors. The room where the arrest was made was back of the cigar store. There is a partition between the cigar store and the billiard-room. I happened to go to the Arctic Billiard Parlors that evening for the reason that about nine o'clock Mr. Nelson came to my office downstairs here and stated—

Mr. GRIGSBY.—(Interrupting.) Object to anything Mr. Nelson stated on the ground that the conversation was not in the presence of the defendants, or any of them.

The COURT.—Overrule the objection.

To which ruling the defendants excepted and an exception allowed.

WITNESS.—(Continuing.) Mr. Nelson came up and got me and stated, "You can get them down

(Testimony of Philip Holland.)

there now," and I went down there with him. He went down there ahead of us. I got deputy marshals Terrell, Reed and Miller. They went down there. We went in the front way. I went to one table, Mr. Miller went to another, Mr. Terrell came in behind us, and Mr. Reed stayed out at the front door. I stepped to the table where Mr. Johnson was sitting at and told them they were under arrest. Mr. Miller stepped to the other table that Mr. Laird was at and put them under arrest. There were checks and cards on the table there. I could not state who were at the "poker-table" except Mr. Laird. They were playing "pangingui" at the table I was at. Mr. Johnson, Mr. Novosel, Mr. Kolbetitz, Mr. Pierson, and Mr. Mason were sitting at the "pangingui-table." I will have to examine my memorandum again. (Witness refers to paper.)

Mr. GRIGSBY.—We object to the witness referring to any memorandum.

The COURT.—Overruled.

To which ruling the defendants excepted and an exception allowed. [57]

(Witness continuing, reading from memorandum.) And Mr. Hanson. The memorandum I refer to is something made after the persons arrested came to the jail. These men at the "pangingui-table" were sitting around the table, had cards in their hands and chips in front of them. There was a big pack of cards in the center of the table and cards in their hands. There were checks right in front of them, in front of each individual player. There

(Testimony of Philip Holland.)

might have been checks out in the center of the table, but I didn't notice that. They were playing "pangingui" at that table. You use four or five or seven decks of cards in playing "pangingui," it depends upon the number of people playing. The eights, nines and tens are taken out of the decks. I took possession of the cards and chips that were on that table. (Witness is handed a bunch of cards.) Yes, those are the cards I turned over to the Commissioner's court.

(A bunch of cards offered and received in evidence and marked Plaintiff's Exhibit "C.")

WITNESS.—(Continuing.) I also took in my possession the checks and chips that were on this "pangingui-table." (Package of checks or chips handed to witness.) Yes, these are the checks I got at that time. They were before each of the players at the "pangingui-table." There might have been a few out in the center of the table but I am not positive as to that.

(A package of checks offered in evidence.)

Mr. O'NEILL.—I would like to examine him before these checks are admitted.

Q. (By Mr. O'NEILL.) Mr. Holland, where did you get those checks?

WITNESS.—(Continuing.) On the table, on the "pangingui-table." I did not put any specific mark of identification upon any of those checks nor have them in my exclusive possession from the time I took them until the present time. I took them and put them in my pocket until we got to the jail and

(Testimony of Philip Holland.)

then I put them in that sack and I left them there in the jail and [58] turned them over to the Court the next day. I left them with the jailor. I think Mr. McKay was the jailor that night. I left them at the jail. I don't recognize the bag. It was one similar to that and the checks were similar to those.

Q. You could not swear those were the specific checks? A. Checks similar to these here.

Mr. O'NEILL.—We object to the admission of the checks upon the ground that there is no foundation laid and no proper identification.

The COURT.—Objection overruled.

To which ruling the defendants excepted and an exception allowed.

(Paper bag of checks received in evidence and marked Plaintiff's Exhibit "D," being an assortment of orange and blue paste-board checks or chips with the following words stamped or printed thereon:

On the orange checks or chips "The Arctic, good for 121½¢ in trade. A. C. Laird, Prop."

On the blue checks or chips "The Arctic, good for 25¢ in trade. A. L. Laird, Prop.")

(Witness continuing, on direct examination.) I arrested these parties at that time before they left the room. There were several people standing around at the time besides the defendants. The people at the other table, at the "poker-table" were also arrested. Mr. Mason and Mr. Hanson were at the "pangingui-table." They were arrested at that time. Charles Mason and A. Hanson. The defend-

(Testimony of Philip Holland.)

ant Gumaer was arrested at that time. I think they registered him as "Gunard" at the jail. There were two games going on when I went into that room, "stud poker" and "pangingui." Mr. Miller went to the "stud poker" table. Defendant Laird was there when I went in. It was about twenty feet from the door into the billiard-room before I got to the table. This occurred in the municipality of Nome on the 5th day of last January.

Cross-examination by Mr. GRIGSBY.

I have lived in Nome since the 14th day of June, 1914. I was here in 1900 the first time. I don't know the game "pangingui." I have seen it played. I have never played it nor [59] observed it played very frequently. The way I know the game I describe as "pangingui" is because they play with ten cards and make spreads the same as in coon-can or something of that kind. I probably cannot give any explanation as good as you can. I cannot explain it. I have never played "rum." I have seen it played. It is played by making spreads the same as in "coon-can," yes, sir, the same thing. They do make spreads in "coon-can"; yes, sir, they take out the eights, nines and tens in "coon-can." Yes, sir, there are cards in the center of the table in "coon-can" and they may use chips. In "coon-can" however you only play with one deck, you play "pangingui" with sometimes five, six or seven decks, depending up on the number of players. I have never seen "coon-can" played with more than one deck. I have never played "coon-can" but have

(Testimony of Philip Holland.)

seen it played. I have never played "coon-can" or seen double "coon-can" played. The way I designate this game as "pangingui" is because the eights, nines and tens were taken out and there were cards in the center of the table and they were making spreads.

Q. Now, who made a spread?

WITNESS.—(Continuing.) They didn't have any time after I got there, nobody that I saw, I didn't see any spreads at that time. No, I didn't identify that game by the fact that somebody made a spread. They had cards in their hands. No, Nelson didn't tell me they were playing "pangingui." I knew because I saw their cards and chips in front of them. It could not have been any other game. I have never played "pangingui" but I have seen it played and know how it is played. I could not play a good hand of it, no, sir. It was "pangingui." I am sure of it. It could not have been "rum." I do not know the difference between "rum" and "pangingui." I don't know anything about "rum." I know "pangingui" but I don't know anything about "rum." It wasn't "rum" it was "pangingui." I told you my belief. [60] I happened to go down to this billiard-hall that night because Nelson came up and told me. I had met him before. Probably forty or fifty times previous to that. I expected him up. I had had a conversation with him about this before, shortly after the first of the year and I knew that he had been down to this place on other occasions. He had not reported

(Testimony of Philip Holland.)

any conditions he found down there. I saw him a couple of times before the 5th of January. Once after the first of January. I had an understanding with him. I had no talk with him about his going down there to collect evidence. He said he would come up and get me. This conversation was on the second or third of January. He said he would come and get me when they were playing down there. At that time I knew he was in the employ of E. R. Jordan, the United States Marshal. Mr. Jordan told me so on the trail when I met him this side of Bonanza. He told me Nelson was in his employ and would make reports to me and what he was employed for. That he was employed to look up gambling conditions in Nome. He did not tell me what place he was to look up nor mention any particular place. Mr. Jordan was then on his way to St. Michael and told me that Nelson would report to me and instructed me to take charge of that particular matter. Mr. Miller was the chief deputy but this particular matter was turned over to me. That was the reason Nelson reported to me instead of to the chief deputy. I arrived in Nome on the evening of the first of January and saw Nelson I think the next day. I don't remember whether in the office or on the street. He said he would go down there and look around. He didn't say where. On the night of January 5th he came back. He came back the first time on the second. The substance of the conversation I had with Nelson the first time I saw him after I got back from out of town was to the

(Testimony of Philip Holland.)

effect that he would tell me, he would come up and tell me when he found them gambling. He did not refer to any particular person. I didn't have any conversation with him in regard to any [61] particular place at all. He said he would come up and tell me, no place was mentioned. I had no idea what place he was watching. I didn't know whether he was watching the Winsor, or Barney Gibney's or a place on Steadman Ave. in the Realty Building, or the Dunham Building or Yorkey's. I didn't know there were that many places in town. I didn't know that there were more than that. He might have referred to the Mumm Club and gone there too, I don't know. I had no definite idea what place "Black Nels" was referring to when he said, "I will go down and let you know when they are gambling." I had several ideas.

Q. What were your several ideas?

Mr. SAXTON.—Objected to. What his ideas were had nothing to do with this.

The COURT.—Objection sustained.

To which ruling the defendants excepted and an exception allowed.

WITNESS.—(Continuing.) There are several places he might have gone to in town. Several cigar-stores where they played cards at times. He could have gone to the "Glue Pot." No, not to Bruner's that wasn't open then. He could have gone to Yorkey's and Barney Gibney's, I don't know what he referred to. I didn't ask him. He told me he was working on the matter, I didn't ask

(Testimony of Philip Holland.)

him where he was working nor what he was working on. He came back on the 5th about 9:30 in the evening. He said, "You can get them now." He did not say who it was I could get. He told me where it was, he said, "Down to the Winsor." That was the first time I knew the Winsor was the place. When I went into the Winsor, now called the Arctic Billiard Parlors I went through a double door in the cigar-store. There is an ordinary cigar-stand there with show goods in it, and the cigar-store is about 10x25 feet and then there are some swinging doors without any latch on them at all opening into the billiard-hall. No other obstructions into the billiard-hall. The billiard-hall is a large room about 40 by 25 feet. There are two tables, pool or billiard-tables [62] there and one or two card-tables setting around. There were some people there sitting playing cards. There were no obstructions to our going in at all, everything was wide open, and I saw some men playing cards at one table. I was on the other side of the room from where Mr. Miller went so I don't know what was being played at that table. I went there to where they were playing "pangingui" to the best of my belief. They had checks in front of them and it looked like they were playing for them. I do not know of my own knowledge what those checks represented. It was just as if I went into Yorkey's or the "Glue Pot" and they had checks in front of them, that is all I know of my own knowledge and all I claim to know. Ed. Johnson, Frank Koibetitz, Chas. Mason, A.

(Testimony of Philip Holland.)

Hanson, John Novosel and Alfred Pierson were sitting at the "pangingui-table." I am willing to swear to it. I am equally positive as to each one of them that they were all present at that table and were participating in the game. We came in there so quick and told them to drop their cards and I put them all in the middle of the table and they had cards in their hands and I made them put them down. I would not swear which men had cards in their hands. They were all sitting at the table. To the best of my belief they all had hands, I would not positively swear to it. I will swear that each of the ones I mentioned was at that table. I did not make a note of those that were at that table while they were there. We didn't get their names until they came to the jail. There were ten arrested altogether and we took them in a body to the jail and Mr. Miller made the note. He booked them there.

Q. Did you make a memorandum of it?

WITNESS.—(Continuing.) Only what he gave to me at that time. He booked four people he had at his table and I swore that the other people were sitting at my table. I made the memorandum that have referred to right after that at the jail but not until [63] they were in jail. I made the memorandum from the jail-book. We had Koibetitz before and we had him before as "Quebec Johnson" and we could not tell who they were from the different names they gave. I did not make the entries in the jail-book. I swear that Johnson was playing "pangingui" and also Pierson, Mason, Koibetitz,

(Testimony of Philip Holland.)

Hanson and Novosel. I saw nobody playing at the "stud poker-table" because I didn't go over there. I saw Mr. Laird sitting there but I did not go over there. I had no other reason for going down and making this arrest than that Mr. Jordan had instructed me that he had employed this man Nelson who would report to me. I had no prejudice against Johnson or any of these defendants. I never threatened Johnson with arrest. I did have a conversation with Johnson in the Eagle Saloon, the saloon conducted by Henry Burgh, formerly the Hunter Saloon, shortly before this. It was on Christmas Eve in the presence of Johnson, myself and Perry Moore. I did not at that time and place state to Johnson, "I am going after you and I am going to get you," or words to that effect. I had been at Johnson's place before on the previous evening and Johnson come in there. He was not at home when I first called. I didn't threaten him in his place. I did not tell him I was going to get him. I had no particular prejudice against Johnson at all. I did not testify on the former trial of this case that I never was acquainted with Nelson otherwise known as "black Nels" until the evening of this raid. I am sure of that. I never discussed this matter with him at any time. I talked about it but I didn't discuss it. He said he would come up and get me but that isn't discussing it. I did not talk with him about it. I never talked with him.

Q. Did you not state on the former trial of this case in the presence of the Judge of the court and

(Testimony of Philip Holland.)

Mr. Saxton and the jurors assembled, that you never had talked over the matter of this gambling with Nelson until the night he came for you to make [64] this arrest, did you so testify?

A. I never talked with him.

WITNESS.—(Continuing.) I never talked with him except about the second of January. I don't know whether I made that exception on the former trial or not. I don't remember.

Q. Now after Nelson had made this report about this particular place did you direct him to look up other places?

Mr. SAXTON.—Objected to as immaterial.

Mr. GRIGSBY.—It shows the interest of the witness and is proper cross-examination.

The COURT.—Objection sustained.

To which ruling of the Court defendants excepted and an exception allowed.

WITNESS.—(Continuing.) I did not talk with him after this at all except in a casual way to say how-do-you-do, that is all.

Q. Did you ever ask him if he had ferreted out any other gambling in Nome?

Mr. SAXTON.—Objected to as immaterial.

The COURT.—Objection sustained.

To which ruling of the Court defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) I do not know how long he continued in the employ of the marshal after made this arrest except as it was brought out in the former trial. He never made any more reports

(Testimony of Philip Holland.)

to me of violations of the law.

Q. Did he ever make any report about Barney Gibney's place?

Mr. SAXTON.—Objected to as immaterial.

The COURT.—Objection sustained.

To which ruling of the Court defendants excepted and an exception was allowed.

Q. Did he ever make a report about a gambling resort on Steadman Avenue?

Mr. SAXTON.—Objected to as immaterial. [65]

The COURT.—Objection sustained.

To which ruling of the Court defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) He was never in the office to my knowledge after this arrest.

Q. So after the arrest of these defendants you consider that the gambling evil had been suppressed?

Mr. SAXTON.—Objected to as calling for the conclusion of the witness.

The COURT.—Objection sustained.

To which ruling of the Court defendants excepted and an exception was allowed.

Redirect Examination.

Q. (By Mr. SAXTON.) You stated on cross-examination, Mr. Holland, that you did have a conversation with Mr. Johnson in the Eagle Saloon in the presence of Perry Moore. What was that conversation?

Mr. GRIGSBY.—Objected to, if the Court please,

(Testimony of Philip Holland.)

until some evidence of it is shown. It is not proper evidence in chief.

Mr. O'NEILL.—Objected to as not redirect examination.

The COURT.—Overrule the objection.

To which ruling the defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) I was in the Winsor Billiard Parlors on Christmas Eve. There was a kind of hub-bub when I got up there, several men were sitting around tables. I came down to Johnson's place. Johnson came in there and I told him the next time I came up I would get the tools, that they would not ring buzzers on me and laugh around at me, I would get the tools, that is all I said.

Q. When you made the arrest on the night of the 5th of January last did you afterwards go back and make further search of the premises? [66]

Mr. O'NEILL.—Objected to as incompetent, irrelevant and immaterial, *res inter alios acta*, no part of the *res gestae*, no connection shown and no foundation laid.

The COURT.—Objection overruled.

To which ruling of the Court defendants excepted and an exception was allowed.

A. I did. I searched the lower floor and I searched the upper floor. I got out a search-warrant.

Q. What were you looking for?

Mr. O'NEILL.—Same objections on same grounds.

The COURT.—Overruled.

To which ruling of the Court defendants excepted

(Testimony of Philip Holland.)

and an exception was allowed.

A. Well, checks, dice, gambling tools. I found under that search-warrant on these premises and took in my possession playing cards and checks and gave them a receipt for them.

WITNESS.—(Continuing.) Yes, those checks in that drawer you showed me are the checks I referred to, to the best of my belief. I took them with me and turned everything over to the court on the day of the trial. These are the checks and cards.

(Drawer of checks and cards offered in evidence.)

Mr. O'NEILL.—Objected to on the ground that they are immaterial and not connected with the crime, and calculated to prejudice the jury against the defendants.

The COURT.—Objection overruled.

To which ruling of the Court defendants excepted and an exception was allowed.

(Drawer containing boxes of playing cards and decks of playing cards, assortment of chips and checks and a coin rack admitted in evidence and marked Plaintiff's Exhibit "C.") [67]

WITNESS.—(Continuing.) I also took into my possession at that time two tables. I found the checks and cards in a locker in the wall right back of where they were playing poker, back of the poker-table in the billiard-room. The locker was set in the wall with a lock and key. The tables I took in my possession were the two that were being played on at that time. (Two tables being produced the witness continued.) Yes, those are the tables I took in my

(Testimony of Philip Holland.)

possession at that time. That one over there they were playing "pangingui" on. The poker-table was that one with the green cloth. The "pangingui-table" is the one with the light cloth on.

(The green cloth table admitted in evidence, marked Plaintiff's Exhibit "F." The light cloth table received in evidence and marked Plaintiff's Exhibit "G.")

Recross-examination.

In that conversation I had with Mr. Johnson I told him I was going to come up and get his tools. That was Christmas Eve. That was before I knew that Nelson had been employed or was going to be employed. Yes, sir, before I knew Nelson I had already threatened Johnson that I was coming up to get his tools if that is what you call a threat. I made that statement. I had already been in his place and told him the next time I came up there there would be no buzzers ring on me or anything like that, that I was going to get his tools. I walked in there like anybody else on Christmas Eve in a public place, I had no purpose whatever, absolutely none. Just went in to look around. I probably went in there to look around to ascertain whether gambling was going on.

Q. Did you or did you not go in there for that purpose? A. I went in to look around, yes, sir.

Q. So you were looking up gambling at that time yourself?

A. I went to look around, not at gambling, but if I saw it, yes, sir. [68]

(Testimony of Philip Holland.)

Q. Did you have it in your mind what you were looking for?

A. Yes, sir, I went to look around.

Q. At that time you were looking elsewhere in town? A. Yes, sir.

Q. What other places did you suspect?

The COURT.—Don't go into that.

Mr. GRIGSBY.—It is to show the prejudice of this witness. If he had a personal prejudice against the defendants I have a right to show it. (Argument.) If he knew of a dozen other places and he confines his attention to one it shows a personal animus against these defendants which I have a right to show to affect his credibility before the jury.

The COURT.—I rule it out.

To which ruling of the Court the defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) Yes I told him on Christmas Eve in the presence of Perry Moore that the next time I came up there I was going to take his tools. Yes, sir, I did go up to Johnson's on January 5th and get some of the tools.

Q. And in order to fulfill your promise you swore out a search-warrant and went back and got some more of them? A. What was left, yes, sir.

WITNESS.—(Continuing.) My object in going back and getting these tables was to stop him from gambling. I have no duties of prevention of crime, just only as a peace officer.

Q. You went down to get these tables so as to have him bound over on the preliminary hearing until the

(Testimony of Philip Holland.)

grand jury met and in the meantime hold these articles to work a hardship on them?

A. No, I didn't do it.

Q. You swore out a warrant? A. Yes, sir.

WITNESS.—(Continuing.) They are still gambling down there to [69] the best of my belief. I believe they are. I went down and got these tables for the purpose of stopping them from gambling if I could. I got them to get evidence and to stop future gambling, both. I thought it was better evidence to have the tables here so they could see them. I don't know whether, if I swore to the jury that I saw a green-covered table they would believe me or not. I have heard you say that there are other tables here in Nome. I went and got Johnson's tables because I had just arrested him for gambling and put a charge against him so as to get evidence.

Q. Mr. Holland, will you explain to the jury your motive after you had arrested these defendants on the information given you by "Black Nels" and after the preliminary examination in which yourself and Miller and the other deputies testified, you caught them playing "pangingui" and "stud poker" and produced checks and cards they were playing with, what was your motive in going back and getting these tables?

The COURT.—I rule the question out.

To which ruling of the Court the defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) I have been deputy marshal since the 14th day of July, 1914.

(Testimony of Philip Holland.)

Q. Have you ever gone to any place in Nome and seen tables before?

The COURT.—Rule the question out.

To which ruling the defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) I have absolutely no prejudice against any of these defendants.

Whereupon court adjourned until 10 o'clock Friday morning, April 28th, 1916 [70]

And thereupon court convened Friday morning at 10 o'clock, April 28th, 1916.

PHIL HOLLAND, was recalled by defendants for cross-examination and testified as follows:

Among those present at the place where I made the arrest were N. B. Nelson, Charles Mason and A. Hanson. They were arrested together with the defendants. They were the three men who were defendants with these other defendants in the Commissioner's Court where the preliminary hearing was held. I testified at the preliminary hearing. I did not say anything there at the preliminary hearing about this N. B. Nelson having come up after me because I wasn't asked to. I am sure I was not asked. I was not asked if any two men asked me.

Q. Now, I will ask you, Mr. Holland, if at that preliminary examination which was held against these seven defendants and also Mason, Hanson and Nelson, known as "Black Nels," in the presence of these defendants and the United States Commissioner Frawley, on the 6th or 7th day of January, you didn't make the following answers to the follow-

(Testimony of Philip Holland.)

ing questions: “Q. Now who told you to go down there and make that arrest? A. Myself. Q. Nobody else? A. Well, I went around there once before. Q. Did anybody get you to go around there? A. No, sir.” Did you make those answers to those questions? A. I don’t remember.

Q. Did you make the following answers to the following questions: “Q. Did you have any information that they were gambling any there when you went in? A. I had been up there before—well yes, we had general information, in a general way, yes, sir.” Did you make those answers to those questions? A. I think I did; yes, sir.

WITNESS.—(Continuing.) At that time I knew that Nelson, one [71] of the defendants right there before me, was the man who gave me the particular information which led me to go down there. I could not tell you why I did not say so when I was asked nor why I avoided that question.

Q. Was it because you wanted us to keep on thinking Nelson was one of the defendants so he could hang around my office and act as a stool-pigeon for further purposes?

A. I don’t know whether he hung around your office or not, I could not say.

WITNESS.—(Continuing.) I knew that you (referring to Mr. Grigsby) was down there representing him as his attorney and that you asked me what led me to go down to this place and that I did not tell you.

(Testimony of Philip Holland.)

Redirect Examination by Mr. SAXTON.

I have no further explanations that I wish to make.

(Witness excused.)

Testimony of Frank C. Dean, for the Government.

Thereupon FRANK C. DEAN, a witness called for and on behalf of the Government, being duly sworn testified as follows:

Direct Examination by Mr. SAXTON.

My name is Frank C. Dean. I am the license clerk. Mr. A. C. Laird made application for and secured licenses for the Arctic Billiard-hall and the Arctic Cigar-store in what is known as the Winsor Building in Nome. The application for the cigar-store was made on the 23d of December last year. The application for the billiard-tables were made one on the 23d of December and the other on the 27th of December. The licenses were issued to Mr. Laird for the period of one year. There has been no transfer of them.

(No cross-examination. Witness excused.) [72-73]

Testimony of A. B. Miller, for the Government.

Thereupon A. B. MILLER, a witness produced and called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination by Mr. SAXTON.

My name is A. B. Miller. I am the chief deputy marshal for this district. Have held that position since the fall of 1914. I have been in the marshal's

(Testimony of A. B. Miller.)

office since July 14th, 1913. I was with Deputy Holland on or about the 5th of January this year when the defendants in this case were arrested. Deputies Terrell and Reed were also with me. Mr. Terrell is now on his way to St. Michael on official business. This arrest took place at the old Winsor Building on Front Street downstairs in a room back of the cigar-room, the second room back. In going in from the street you go in to the cigar-store first and there are doors from the cigar-store into this room, double swinging doors. There is a pool-table in there and card tables. Mr. Holland went in first and I followed him and a little behind me was Mr. Terrell, Mr. Reed was in the outer office or room. As we entered the room we saw people playing cards at two tables. We went in there and placed them under arrest, took the cards and checks with us. We saw them playing at two tables. As we went in Mr. Holland placed them under arrest. He took charge of one table and I took the other table. At the table I was at they were playing "stud poker." Those playing at that table were Laird, Skorlich, Nelson, Gumaer and Elmer Adams. At the other table that Mr. Holland took charge of there were Ed Johnson, Alfred Pierson, John Novosel, Frank Koibetitz, Chas. Mason and A. Hanson. We arrested ten of those parties at that time. Elmer Adams was not arrested. He was left in charge of the building. They were playing "stud poker" at the table I went to, Laird, Skorlich, Gumaer, Nelson and Adams. You play "stud poker" with a regular deck of cards.

(Testimony of A. B. Miller.)

At this table the cards were lying in front of each player, one card faced down and the balance faced up. Laird was dealing in that game. They were playing for chips. A number [74] of chips were in the center of the table and some around each player. I gathered them up and put them in my pocket and later brought them into court. (A deck of cards handed to witness.) Yes, that is the deck.

(Deck of cards offered and received in evidence and marked Plaintiff's Exhibit "A.")

(Envelope containing checks or chips now handed to witness.)

WITNESS.—(Continuing.) I would say that these are the checks I took in my possession at that time.

(Envelope containing assortment of white, blue and red checks or chips with the following words stamped or printed thereon:

On white chips "The Arctic, good for 12½¢ in trade A. C. Laird, Prop."

On blue chips "The Arctic, good for 50¢ in trade, A. C. Laird, Prop."

On red chips "The Arctic, good for \$1.00 in trade, A. C. Laird, Prop."—Received in evidence and marked Plaintiff's Exhibit "B.")

WITNESS.—(Continuing.) There were some other checks on the "poker" table at that time which were taken by Mr. Terrell. At the time of the arrest Mr. Gumaer gave his name as "Gunard," "B. Gunard," I think. I understand they were playing "pangingui" at the table Mr. Holland took charge of, but I didn't see them, I didn't pay any attention

(Testimony of A. B. Miller.)

to that table. I saw cards on that table. I could not say whether a single deck or quite a bunch. There were checks on that table. I didn't pay much attention to that table. I went to the other table. Mr. Holland had charge of that table.

Cross-examination by Mr. GRIGSBY.

I knew that there was going to be a raid just a little bit before ten o'clock that night. That was my first knowledge of a raid being contemplated. I am the chief deputy. Mr. Holland had charge of the conducting of this affair. He came after me and that was the first information I had about it. I did not know anything about these instructions from the marshal. Yes, sir, this is an ordinary looking billiard-hall, nothing to distinguish it from any other billiard-hall except the card tables that were in there. It is open, anybody can walk right in there into the [75] cigar store and then into the billiard-hall. I went in and saw some men engaged in playing cards at one table at the left side of the room beyond the two billiard-tables. They were in view from any part of the room. They were not in a box or anything like that. It is a pretty good-sized room and on either side of the room were men engaged in playing cards. I went to the table at the left as I went in and saw they were playing "stud poker" there. The play ceased the minute we stepped into the door and I did not see anybody do anything in that game, nor any play being made. I didn't see any handling of cards. If there was any handling of cards it was before I stepped in. How long before I don't know, but the cards all

(Testimony of A. B. Miller.)

lay in front of them. I have no doubt but what they could lay in front of them indefinitely if they laid them there once. I didn't see anybody playing the minute we passed in the door. When we passed in the door of course there was nothing doing. I didn't see them playing the game; no, sir. I judge that the game they had been playing just before coming in there was "stud poker." I have been acquainted with the game of "stud poker" for seven or eight years. I do not know any more about it now than I did before I made this raid. I knew the game before I made this raid at all, as much as I know about it now. The reason why I know it was "stud poker" was the position the cards were in. There was one card lying face down and the balance were faced up. The balance were four cards in front of each player. There were five all together. Each player had cards. Yes, sir, if I recollect correctly each player had five cards, one down and four faced up. There were in front of each player one card buried, as they call it, and four faced up. I believe I stated that in the former trial that each man had five cards, one faced down and four faced up. There were checks in the center of the table. I didn't count them and don't know how many. I know how "stud poker" is dealt, how they get the cards. They are dealt by the dealer one at a time. As I understand the game the man who is the highest [76] is the first man to bid and then they deal around again. The high man bids after the second card is dealt as I understand it. The first card is buried. Before anybody

(Testimony of A. B. Miller.)

gets cards each player has to ante, and then they deal a card around to each player after they have dealt the buried card and then the high man bets and everybody who wants to stay in that pot has to either call or raise his bet. Then when the third card is dealt around that occurs again so that if there were five cards in front of each player all five men must have stayed in the pot. Yes, sir, possibly that must have been a pretty good pot. Yes, sir, there was a good fair quantity of checks in the center of the table as I recollect. Yes, sir, there were still checks in front of each player. No, sir, notwithstanding there were five in the game and everybody had checks in front of them and everybody stayed to the finish nobody seemed to have tapped themselves. I am not a "stud poker" judge and don't know that that is something that doesn't happen once in four hundred and fifty million times. No, I didn't especially examine the hand in front of Elmer Adams. I don't know what his hole card was. No, I don't know what it is now but I can tell you outside. I am positive that the people engaged in that game were Mr. Laird, Mr. Koibetitz, Mr. Nelson, Mr. Gumaer and Elmer Adams and my recollection is that Mr. Pierson, the defendant present, was not engaged in that game but was at the other table playing "pangingui." I so testified at the preliminary hearing and also at the former trial here of this case and still say so.

(Witness excused.) [77]

Testimony of E. R. Jordan, for the Government.

Thereupon E. R. JORDAN, a witness produced for and on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by F. M. SAXTON.

My name is E. R. Jordan. I am the United States Marshal. I have held that position since 1913. I know N. B. Nelson a witness in this case. Shortly prior to the arrest of the defendants in this case in January I had employed him to look up gambling matters. It was the last day of December. It might have been the 29th or the 30th, I am not sure. I was on my way to St. Michael when this arrest was made. I informed one of my official force, Deputy Holland of the fact that I had employed Nelson. I informed him between Safety and Solomon where I met him on the trail. I told Nelson to go down town and look up any gambling and report to Mr. Holland at the office. I paid him for his services. He was thirteen days in my employ. I paid him sixty-five dollars from my own private funds. Not Government funds, my own money.

Cross-examination by Mr. O'NEILL.

I have five deputies in my office. I don't know, I don't remember whether or not they were all busy about the latter part of December. I don't know whether they were busy prior to the time I left on that trip. Yes I do know very much about the internal affairs of my office. Mr. Miller was doing his regular duty about that time, also Mr. Holland. Mr. Terrell was working in the office.

(Testimony of E. R. Jordan.)

Q. Now did their regular duties about that time of the year consist of anything more burdensome than warming chairs?

A. Well, that is my business.

The COURT.—I don't want any more of that. It has nothing to do with this case.

Q. Why did you employ Nelson?

A. That is my business.

Q. Did you employ him as United States Marshal or as a private [78] citizen?

A. That is my business.

Mr. O'NEILL.—Well, that question will be my business.

The WITNESS.—Well, go ahead now.

Mr. O'NEILL.—I insist that that question be answered. I asked the witness if he employed Nelson as the United States Marshal or as a private citizen.

The COURT.—Ask him in what respect and how he employed him.

Q. How did you employ Mr. Nelson and in what respect?

A. I told him to go down and look up any gambling and report to the office. I did that in my official capacity.

Q. Why did you pay him out of your private funds? A. That is my business.

Mr. O'NEILL.—Now, if your Honor please, I am not going to stand for the impudence of this witness.

The COURT.—I don't think the witness is impudent. Take your seat! He has a right to pay his own money if he wants to.

(Testimony of E. R. Jordan.)

Mr. O'NEILL.—I have a right to know why he paid his own money to show the *animus* of the witness if any there be.

The COURT.—He has stated because he chose to do so.

Mr. O'NEILL.—He said it was his business. I want to know why he chose to do so.

Defendants excepted to the ruling of the Court in refusing to compel the witness to answer the question and an exception was allowed.

WITNESS.—(Continuing.) I never took it up with you Mr. O'Neill to find out whether or not the Department would or would not have allowed me any sum I might have paid to Nelson as an official. I don't know that the Department would not have allowed [79] that sum that I paid to Nelson. It is a part of my official duty as United States Marshal to investigate gambling in this community —if I see fit. If I see fit to investigate it it is my duty.

Q. And if you don't see fit it is not your duty?

A. That is my business.

WITNESS.—(Continuing.) It might have been a part of the duties of my deputies to investigate gambling in this community about the time I hired "Black Nels."

Q. You don't know whether it was or not?

A. That is my business.

WITNESS.—(Continuing.) I did not investigate Barney Gibney's place. I paid Nelson sixty-five dollars. I promised him five dollars a day.

Q. You said you gave him sixty-five dollars. Did

(Testimony of E. R. Jordan.)

you give him a promise as well?

A. If I did it is my business.

Q. Did you ever hear of the two hundred dollar mystery?

A. Well, when I look at you it reminds me of a mystery any time.

(Witness excused.) [80]

Testimony of F. J. Mielke, for the Government.

And thereupon F. J. MIELKE, a witness produced on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination by F. M. SAXTON.

My name is Frank J. Mielke. I am acquainted with the property known as the Winsor Bath House here in Nome. Was formerly the owner. According to the records the property is still mine. I issued a deed to Mr. Johnson in the latter part of June, 1915, on the installment plan. That deed is placed in escrow on the installment plan. All installments have been paid to date. The deed is in escrow in Mr. Grigsby's safe. Under the escrow agreement Mr. Johnson, the defendant, is entitled to the possession of the building and entitled to the deed when he pays the balance of the money. I have no control over the place whatever at the present time.

Cross-examination by Mr. Grigsby.

All the installments have been paid to date. They were all paid in cash. There was a cash payment made at the execution of the deed and also monthly payments until the first of November, or thereabouts, and shortly after, about the 5th or 6th of November,

(Testimony of F. J. Mielke.)

there was a larger payment made. No payments have been made since and none have been due since.

(Witness excused.)

Testimony of Wm. Dougherty, for the Government.

Thereupon WM. DOUGHERTY, a witness produced on behalf of the plaintiff, being duly sworn testified as follows:

Direct Examination by Mr. SAXTON.

My name is Wm. Dougherty. I have held the position of patrolman of the city of Nome the greater part of the past year. I know the defendant Ed. Johnson. Have known him quite a few years. Sometime prior to the 5th day of January, 1916, the defendant Ed. Johnson, in my presence, made a statement as to his intention [81] with reference to carrying on gambling here in Nome. He said he was going to gamble. He intended to gamble.

Mr. GRIGSBY.—I didn't notice the question if your Honor please. I ask leave to have an objection entered on the ground it is too remote, doesn't tend to show whether or not the crime was committed on the 5th of January as charged in the indictment.

The COURT.—*Objected* noted and overruled.

To which ruling of the Court the defendants excepted and an exception allowed.

WITNESS.—(Continuing.) That statement was made somewhere along in October, 1915.

Mr. GRIGSBY.—We move the answer be stricken out as fixing the time too remote to have any bearing on this case.

(Testimony of Wm. Dougherty.)

The COURT.—Overruled.

To which ruling the defendants excepted and an exception was allowed.

Cross-examination by Mr. Grigsby.

That conversation took place on the street. Mr. Johnson spoke about gambling and said he intended to gamble. Claimed it was different with him than it was with other people on account of his being crippled so he could not get out and work as he used to do and that was his way of making a living. That was last October. I don't know the first time I told that to the District Attorney. The first time I remember of saying it in his presence was in the grand jury room. What I have just testified to is all that I stated in the grand jury room as near as I can recollect. I don't know how Mr. Saxton knew I had heard Johnson say that last October. I don't know whether I ever told anybody else. It was common talk,—not that Johnson had told me that but the remarks he passed. Yes, sir, the remarks he passed [82] to me. I think he had told other people about it. I think he told it in the presence of other people. I don't know whether those other people were called as witnesses on that subject. I don't know as anybody was there but ourselves when he talked to me. I cannot tell you how other people knew about this particular instance. I don't think I ever told it to Mr. Saxton. If I did it is so long ago I have forgotten. I remember when I was before the grand jury that Mr. Johnson told me this last October. I never worked a minute in my life for the marshal's

(Testimony of Wm. Dougherty.)

office. Never was asked to, have never been in Mr. Jordan's employ or rendered him any assistance at any time.

(Witness excused.)

Testimony of N. B. Nelson, for the Government.

And thereupon N. B. NELSON, a witness produced on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination by Mr. SAXTON.

My name is N. B. Nelson. I live on Third Street in Nome, Alaska. I have lived in Nome since 1907. My occupation lately has been driving a team. I have worked for W. J. Rowe. I know the defendants in this case. I was present when they were arrested on or about the 5th of January in the Winsor Building or Arctic Billiard room or hall. I had prior to that time made arrangements with Marshal Jordan to act for him in hunting out gambling. I entered into his employ the 29th or 30th of December last year. I cannot recall the date this arrest was made. It was the first part of January of this year. According to my arrangement with Marshal Jordan I was to report to the marshal's office after I located gambling. I was to report when conditions were such that they could make raids. I was present when this arrest was made. It was between nine and ten [83] o'clock. Prior to that time I had notified the marshal's office. I went to this place first and sat in the "stud poker" game. Could not say positively how long. Afterwards quit the game and went to the marshal's office and saw Mr. Holland.

(Testimony of N. B. Nelson.)

Q. And what did you report to him?

Mr. GRIGSBY.—Objected to as calling for a conversation not in the presence of the defendants, or any of them.

The COURT.—Overruled.

To which ruling of the Court the defendants excepted and an exception allowed.

WITNESS.—(Continuing.) I reported that there was gambling down at the Arctic Billiard Hall and he could get them and then I went back and got into the game again. There were games going on when deputy marshals Holland and Miller came in. At the table I was at there was a “stud poker” game. That green table there (indicating) was the one I played on I think. There were playing “stud poker” at that time myself, Mr. Laird, Mr. Pierson, Mr. Gumeear, Mr. Adams and one more. I don’t recollect his name. It was one of these defendants here but I could not say which one. I cannot point him out. All the persons sitting at that table were playing “stud poker.” That was what I was doing when Mr. Holland and Mr. Miller came in. You use cards to play “stud poker” with, one deck. We were playing for chips. They had a value of one dollar a stack. I bought into that game one or two dollar’s worth. The other parties sitting at the table also bought checks. They paid a dollar a stack for them. They bought them from Mr. Laird. He kept them in a little hole in the wall, a little cupboard that fits in the wall in the same room. I saw the money paid for these chips. Nothing in particular happened when

(Testimony of N. B. Nelson.)

Mr. Miller and Mr. Holland came in. The game stopped. The men playing were placed under arrest. I was placed under arrest [84] at the same time.

Q. Now, with reference to who was present at your table, I will ask you if this gentleman sitting behind me was at your table?

(Counsel turns and points to one of the defendants.)

Mr. GRIGSBY.—Objected to as leading if the Court please.

The COURT.—Overrule the objection.

To which ruling of the Court the defendants accepted and an exception allowed.

A. He was.

WITNESS.—(Continuing.) Mr. Pierson was at the table. I could not recall who was at the other table except Johnson, Mason and Hanson and I presume they were playing “pangingui.” I could not swear any more than that they were calling for their collections. They were playing “pangingui” with cards, using eight decks I believe and playing for one dollar a stack for chips just the same as the other game. They bought them from Mr. Johnson. I saw one man buy them. He paid money for them. They used the same kind of checks as that at the “stud poker” table. I had been playing “stud poker” there that same evening before that and had been playing for money or chips at that time of the same value, one dollar a stack.

Q. Had you ever been in there before and seen them gambling?

(Testimony of N. B. Nelson.)

Mr. GRIGSBY.—Objected to as calling for proof of another offense, and incompetent and prejudicial.

The COURT.—Overrule the objection.

To which ruling of the Court the defendants excepted and an exception allowed.

Mr. SAXTON.—I will state to the Court that it is proper to confine this part of the testimony to the owner and proprietor of the building. That is all we ask for.

WITNESS.—(Continuing.) I had seen them gambling pretty near every night for a week, playing “stud poker” and “pangingui.” I [85] played. They played for chips of the same value on those nights. I don’t remember whether I played “stud poker” all the time or “pangingui.” The reason I didn’t report these previous games was I didn’t think there was any chance of making an arrest. I didn’t think there was any chance for the marshal catching them in the act. I never saw Mr. Laird at those previous games, Mr. Johnson was there.

Q. From whom did you buy chips at those previous games?

Mr. GRIGSBY.—Objected to as being proof of another offense not connected with the crime charged in the indictment.

The COURT.—Overruled.

To which ruling of the Court the defendants excepted and an exception allowed.

A. Whoever might be running the game.

Q. Did you buy any from Mr. Johnson?

Mr. GRIGSBY.—Objected to as leading.

(Testimony of N. B. Nelson.)

The COURT.—Objection overruled.

To which ruling of the Court defendants objected and an objection allowed.

WITNESS.—(Continuing.) I think I did. At the time the arrest was made Mr. Laird was running that “stud poker” game. I could not say for certain who was running the “pangingui” game. Mr. Johnson was sitting at that table.

Cross-examination by Mr. GRIGSBY.

I was born in Denmark. I came to America in 1893. I am thirty-eight years old. I came to Alaska in 1902, first to Skagway in 1898, then went to the Spanish-American war; came back to Wisconsin and then went to Minnesota, from there to Seattle, Washington, from there to San Francisco, then back [86] to Washington, then to Nome. Stayed in Nome three years, then went back to Washington and returned to Nome again. I have been here ever since. Have never been in the Iditarod. Was in Marshall City one fall. Had no trouble up there, not the slightest. I have never been convicted of a crime. I have never tried to convict anybody of a crime before this. Never was on the witness-stand before.

Q. Have you ever done what is called “stool-pigeoning” before?

Mr. SAXTON.—Object to that.

The COURT.—Objection sustained.

To which ruling of the Court defendants excepted and an exception allowed.

(Testimony of N. B. Nelson.)

Q. Have you ever done any "gum-shoeing" or sleuthing?

Mr. SAXTON.—We object to the "gum-shoeing."

The COURT.—Objection sustained.

To which ruling of the Court defendants excepted and an exception allowed.

Q. Have you ever acted as an informer before?

A. I don't really know the meaning of your term.

Q. Do you understand what the term "stool-pigeon" means? A. Yes, sir.

Mr. GRIGSBY.—I will ask permission to use the language the witness understands, if the Court please.

The COURT.—Overrule the permission.

To which ruling of the Court the defendants excepted and an exception allowed.

Mr. GRIGSBY.—I have either got to use that or have an interpreter. I used the word "informer" and he said he didn't understand it.

The COURT.—(Addressing the witness.) Don't you know what the word "informer" means?

The WITNESS.—I have an idea what it means.
[87]

The COURT.—Counsel wants to know if you have ever been engaged in a business like this before?

The WITNESS.—I have not.

WITNESS.—(Continuing.) I have not stated to persons in Nome recently that I have been engaged in this business before, not that I know of. If I had so stated I don't know whether I would know it or not.

(Testimony of N. B. Nelson.)

Q. Why not?

A. Because I haven't been in the business. If I said it I certainly wasn't.

Q. If you stated it recently within a month or two you would know it, wouldn't you?

A. I don't know as I would because I never was before, and I don't see how I could say it.

WITNESS.—(Continuing.) There might be something the matter with my memory so I could not remember it. I never told a person in my life that that was not the first time I had "stooled." I could not say whether or not I had a conversation with Nick Barge or rather with Merrill Beatty, a bartender in the Nevada in the month of March, in the presence of Nick Barge and Ed Young, in which I told him that this was not the first time I had "stooled," that I had done it before and made quite a chunk of money out of it. I will not deny it because I was in there one morning when I was drunk and if I said it I never did. I have no recollection of saying it. I don't remember what occurred that morning. That was early in the morning. I could not say what time. I don't remember telling him anything at any time in the afternoon. Have no recollection of such a conversation. To the best of my knowledge I didn't have it.

Q. And when you are intoxicated that way do you sometimes tell the truth?

A. Then I don't know what I do. [88]

WITNESS.—(Continuing.) I am not sure I ever told the truth under those circumstances. I am sure

(Testimony of N. B. Nelson.)

that Mr. Pierson was playing "stud poker" with me. I cannot be mistaken about it. He was not playing "pangingui" that night when I was there. I am certain I did not see him playing "pangingui" when the deputy marshals came in and arrested him. He was playing "stud poker" with me, I am absolutely sure of that and if Mr. Holland and Mr. Miller, the deputy marshals, swore he was at the "pangingui" table playing "pangingui" they are mistaken. There were four others playing with me and one of them I cannot name. It was not Mr. Novosel, nor Mr. Mason, nor Mr. Gumaer. I think the gentleman you indicate was in the game. I don't know for certain. There were five men. I am not sure the fifth one was not Koibetitz; I will swear it was not Hanson. I am pretty sure that Gumaer was playing "stud poker" with me that night at the time of the arrest. I will swear he was playing that night. I am absolutely certain of that. At the former trial of this case and also before the grand jury I think I swore Mr. Gumaer was playing "stud poker" with me. I think he was, too. I swore to it at the former trial. The game was five handed at the time the deputy marshals came in. There was a pot being played for. I don't remember anything about that particular pot, nothing remarkable about it. I don't remember how many cards each player had. Nobody stopped to cash their checks. I didn't stop to cash mine in. I was in that pot. I could not say who was playing. The deal went around in that game. Every man was the dealer. Everybody had to ante before

(Testimony of N. B. Nelson.)

any cards were delt. The high man made the bet. If anybody else wanted to stay they had to either call or raise the bet or else turn their cards down. I could not say whether everybody had received five cards or not, or whether everybody was in the pot. [89] I don't know how many were in the pot. I don't remember anything remarkable about the pot. As far as I know there was a "pangingui" game going on over at the other table. I will swear they were calling for their collections, that is all. In my mind there was a "pangingui" game going on there at the other table; I will not swear to it positively. I cannot swear to anybody being over at that other table except Mr. Johnson, Mr. Mason and Mr. Hanson. I will not positively swear there was a "pangingui" game any more than I heard them calling for their collections, that is all I know about it. I was paying particular attention to the game I was in. I had been down there almost every night for a week previous to that and had been playing "stud poker" or "pangingui" for money every night. That is, not every night, but I played there several times, pretty nearly every night for a week, for five or six times. I was employed to look up gambling conditions.

Q. What were you waiting for, waiting for gambling conditions to improve before you made a report?

A. Waiting for a chance for the game to last long enough for the marshals to get down there.

Q. For five or six nights no game lasted long enough for you to go down to the marshal's office and

(Testimony of N. B. Nelson.)

get them and get back again?

A. There might have been time, it might have lasted that long, but it didn't look that way to me.

WITNESS.—(Continuing.) Yes, I was playing. I could not say how long I played at one time. Sometimes an hour, it might have been two hours. Several times I might have played two hours at a time before I made this report but I didn't think there was a chance for the marshal to have time to get down there before the game would break up.

Q. Well did the game break up every time you left it, was that [90] the reason you were afraid to leave it? A. I guess it must have been.

Q. You were the mainstay then in the game?

A. Well, I didn't know as I would have time to go to the marshal's office and get back again.

Q. If it had not been for you there wouldn't have been any game?

A. There were games going on when I came in.

Q. And you sat down there and played and then you were afraid to go up and tell the marshal for fear the game would break up. You tell this jury that do you? A. Yes, sir.

WITNESS.—(Continuing.) Yes, I was down there five or six nights gambling, nearly every night, and the only reason I didn't report the existence of this gambling to the marshal was for fear it would break up while I was doing it. Yes, Mr. Jordan made the arrangements with me. He told me he would give me five dollars a day to look up gambling in Nome. That conversation occurred about the

(Testimony of N. B. Nelson.)

30th or 29th of December, I could not state which. It was in his office. That is all the instructions he gave me. He didn't tell me what I should do to find out if they were gambling. He told me when I got the information to report it to Mr. Holland. He did not tell me to get into the game nor to play; simply told me to make reports to Phil Holland whenever I thought there was a chance to arrest them. I don't know whether I so testified in my last examination.

Q. Didn't you testify in your former examination, on the former trial of this case, that all he told you to do was to look up gambling in the Town of Nome and report to Phil Holland?

Mr. SAXTON.—We object to this. This is reduced to writing and signed by the witness and it is improper to ask this witness what he testified to on the former examination [91] without exhibiting to him the writing.

Mr. GRIGSBY.—Well, where is the writing? I haven't any.

Mr. SAXTON.—I would like to ask the witness a question upon this point.

Mr. GRIGSBY.—We certainly object.

Mr. SAXTON.—We want to show this witness' testimony has been reduced to writing, that he has read it over and signed it and that is all I want to show, if the Court please, by the witness. I want to ask him those questions.

Mr. GRIGSBY.—I have a right to call his attention to any former statements made by him at any

(Testimony of N. B. Nelson.)

time or place which may be inconsistent with his present testimony. It has no reference to any written document. (Argument.) I may want to use that paper to impeach him and it would destroy our purpose to let him read it over and fortify himself against my questions. (Argument.) The statements were oral, they were not in writing, the District Attorney had them transcribed afterwards.

Mr. SAXTON.—If the Court please, that section there was taken from the Oregon law. The purpose of this question is certainly to lay a foundation for impeaching the witness otherwise it has no purpose at all.

Mr. GRIGSBY.—Certainly that is the purpose of it.

Mr. SAXTON.—It was held in *State vs. Crockett* (reads): The Court has held that where it has been reduced to writing the witness cannot be questioned as to that without submitting the writing to him. It isn't fair to the witness if the testimony is in writing.

Mr. GRIGSBY.—If the Court please, in this Oregon case I presume the statute requires the witness to sign the statement. It isn't his statement until he signs it. This statement which the law provides must be written and signed [92] by the witness isn't his statement until he does so and he isn't bound by it. (Argument.) It is only when the statement itself is a written statement that it must be shown to the witness. There is no decision to the contrary.

(Testimony of N. B. Nelson.)

Mr. SAXTON.—If the Court please, this provision is absolutely to the contrary. (Argument.)

Mr. GRIGSBY.—That doesn't apply to oral testimony which hasn't been reduced to writing under any law. Supposing Mr. Saxton had not gone and reduced this to writing, the rule would not change. Supposing we had no such facilities here and I wanted to find out what this man said on a former trial? I certainly would have a right to ask him if he had not testified so and so. Does the fact that Mr. Saxton has his testimony subscribed alter my legal rights? (Argument.) This isn't any legal document. I want to know what he said, I want to know what his recollection is of what he said on the former trial. I have a right to do so. I have a right to test his memory. I have a right to know whether he is truthful or not.

The COURT.—I think that paper ought to be used to find out what the witness did testify to.

Mr. GRIGSBY.—I certainly object to that.

The COURT.—Overrule the objection.

To which ruling of the Court the defendants then and there excepted and an exception allowed.

Mr. SAXTON.—Was your testimony at the former trial transcribed and have you read and signed it?

The WITNESS.—I have.

Mr. SAXTON.—And you found it correct?

The WITNESS.—Yes, sir.

Q. (By Mr. GRIGSBY.) Now did you at that former trial make the following answer to the follow-

(Testimony of N. B. Nelson.)

ing question (using transcript of testimony furnished by Mr. Saxton): "Q. Who else was sitting at the table you were sitting at? A. Mr. Laird and myself, Mr. [93] Adams and that man they call the tamale man, Mr. Pierson, and I think the fellow we call "Rube" Johnson, but I am not certain about him." Did you make that answer?

Mr. SAXTON.—We ask that this writing be exhibited to the witness.

The COURT.—Show it to him, Mr. Grigsby.

Mr. GRIGSBY.—We object to such procedure.

The COURT.—Overruled.

To which duling of the court defendants excepted and an exception was allowed.

(Mr. Grigsby shows transcript to witness.)

Q. Did you make that answer? A. I did.

Q. Mr. Nelson, was Nick Skorlich sitting at the stud poker table at the time of the arrest?

A. No, sir.

Q. You are positive about that? A. I am.

Q. Did you on the former trial of this case testify as follows, referring to the "stud poker table": "Q. Was Nick Skorlich at that table? A. I could not positively state, I am not sure. I think he was." Did you so answer, did you so state? Can you answer that without looking at this paper?

A. I can.

Mr. SAXTON.—I object unless the paper is shown to the witness and he can see what his answer was and what the question was.

The COURT.—Show him the paper, Mr. Grigsby.

(Testimony of N. B. Nelson.)

To which ruling of the Court the defendants excepted and an exception was allowed.

Q. (Mr. GRIGSBY, Continuing.) Did you so answer? A. Yes, sir. [94]

WITNESS.—(Continuing.) I referred to the “stud poker” table.

Q. And you swore a minute ago he was not?

A. I don’t think he was.

WITNESS.—(Continuing.) I don’t know what has happened to change my recollection of it since the former trial. No, I am not intoxicated now. No, I was not intoxicated at the former trial. Yes, the only arrangement I made with reference to this detective work was with Marshal Jordan. I first met Mr. Holland shortly after he came back. I did not at that time have a talk with him. I asked him if he knew about the arrangement the marshal made and he said yes, and I said, “Any time I can I will make a report.” I did not talk about any particular place to go to. I did not talk to the marshal about any particular place to go to. The first place I went after I made this arrangement was Yorkey’s cigar-store. I could not say how long I stayed there. I don’t remember what I did there or whether I played cards or bought tobacco. I did go to Yorkey’s cigar-store to see if there was any gambling, more than once. I was there pretty near every night I was at Mr. Johnson’s. I went to no other places. I didn’t go to Barney Gibney’s. I know Barney Gibney. I was not around his place a great deal. I worked for him at one time. I do not hang around there. I

(Testimony of N. B. Nelson.)

wasn't in Barney Gibney's for nine months prior to this. Yes, sir, I was in there the other day before the trial of this case.

Q. That is the only place in town you dare to go in, isn't it?

Mr. SAXTON.—Object to that.

The COURT.—Strike it out.

To which ruling of the Court the defendants excepted and an exception allowed.

Q. Did you ever gamble in Barney Gibney's?

Mr. SAXTON.—Object to that as immaterial. [95]

The COURT.—Strike it out.

To which ruling of the Court the defendants excepted and an exception allowed.

WITNESS.—(Continuing.) I didn't know there was any gambling joint in the Realty Building after I was employed by the marshal. I did not go there. The only places I went to were Yorkey's and Ed. Johnson's. I went to both of those places for five or six nights to see if there was any gambling. These chips were worth a dollar a stack, yes, sir. There were twenty white ones in a stack. The red ones were worth twenty-five cents and the white ones five cents. I could not say whether there were any more values that night or not. That is the same value they always had every other night that I was there. It was not the same game every night. There was a better game this night of the arrest than there had been other nights. There wasn't any more money in sight; the values were the same, the white ones five cents and the red ones twenty-five cents.

(Testimony of N. B. Nelson.)

I did not state before the grand jury that the reason I reported this to the marshal's office was because I did not like the game, nor because they used marked cards, nor because they did not give me a chance and played against me. I did not state any of those things. There were no such things existed that I know of. As far as I knew the game was square. I had no complaint on the score. No, I did not so state before the grand jury, in my cabin when the grand jury visited me. I got five dollars a day. I got ten dollars in advance. I could not say whether or not I used that ten dollars to play poker with; I could not say if I didn't. I had some of my own money in my pocket; I am not sure. Yes, sir, that ten dollars with my own money lasted me five or six nights. Yes, the only reason I tell this jury that I waited until the 5th of January to report this was because during that whole week there never was a game that I did not fear would break up if I left it to tell the marshal. That is the only reason. I don't know who [96] appeared for me as attorney at the preliminary hearing. I was present at the preliminary hearing with the other defendants. Yes, sir, I have been in your office once, only once, Mr. Mason brought me up there one night, a night or two before the grand jury sat in April. I don't remember whether I talked with you in company with Mr. Hanson on the street before that also. Yes, sir, you were at my cabin and I talked with you there. No, I did not know you appeared for me as my attorney at the preliminary hearing. Nobody ever

(Testimony of N. B. Nelson.)

told me you appeared for me. Yes, sir, I heard you enter your appearance for all the defendants; yes, sir, I was there. No, sir, I didn't dispute that, and I never told you I was not your client.

Redirect Examination by Mr. SAXTON.

I never employed Mr. Grigsby as my counsel. I didn't employ him at the preliminary hearing.

(Witness excused.)

Testimony of J. H. Young, for the Government.

And thereupon J. H. YOUNG was called as a witness for the plaintiff and being duly sworn testified as follows:

Direct Examination by Mr. SAXTON.

My name is J. H. Young. I am employed by G. P. Goggin in the grocery business. I know the defendant, Adelbert Gumaer. Have known him since some time last summer. I had a conversation with him shortly after he was arrested in this gambling case concerning gambling. He admitted to me he had been gambling in a small way.

Cross-examination by Mr. GRIGSBY.

No he did not tell me he had been gambling on this particular night he was arrested. He denied it at first and later on admitted it; admitted that he was gambling on that particular night, yes, sir. I was not talking to him about this for the purpose [97] of getting him to admit it. I was not lecturing him on the subject of gambling. He owed me some money and I was trying to collect some money from him. I asked him first what sort of

(Testimony of J. H. Young.)

trouble he got into and he denied it. I did try to get him to go to the District Attorney so that he could get out of the trouble and I could give him credit again and he might get a chance to pay what he owed, that was my motive. I didn't make a statement to him that they were going to get those fellows and that if he didn't go up to the District Attorney's office and turn state's evidence I would shut off his credit. I made that statement in a different way and not as you put it. I said the best way for him to do was to square himself up and get out of this trouble but made no reference to any body. His credit had been shut off prior to that time. I told him to get his account squared up and pay his bills and I will give you credit so you can continue in business. I said in effect, "If you go to the District Attorney and confess and get out of this trouble I will give you credit so you can open up again and make money to square yourself with." My interest in the matter was merely to collect the bill he owes Mr. Goggin. I did not go to his room in the Elite Bath House and try to get him to go to the District Attorney. I went up to Mr. Johnson's place to try and collect the bill. He promised me money on the bill but he did not show up as he agreed. He claimed he had money coming from the soldiers at the Fort. Yes, sir, I was summoned as a juror in this case.

Q. When did you tell Mr. Saxon what you have testified to to-day?

(Testimony of J. H. Young.)

WITNESS.—(Continuing.) I never went to Mr. Saxton about anything of the kind. He came to me about it several days ago. I did not talk to Mr. Saxton after the preliminary hearing. I never talked with the District Attorney or the marshal. I might have made some mention of it recently to his [98] deputies; that was the only thing. Probably within a week. I asked Mr. Holland one morning if there was any report on the fellows who were missing. I do not remember talking about this fellow Gumaer, but I wouldn't swear. I have no recollection of it. I have not talked about this man Gumaer with the District Attorney prior to the time I went on the stand to-day that I know of. I didn't talk to him about it yesterday. I do not remember having been to his office talking about it. Never talked with him on the street about it. He came to the store, that is the only time I recollect. That was some time about a week ago, I believe. I told him there what I testified to to-day. He reported to me that it came to him from some other source that I had some dealings with Mr. Gumaer. I don't know what that source was.

Q. Don't you know that one of the deputies informed Mr. Saxton to that effect?

Mr. SAXTON.—Objected to as incompetent and immaterial and not cross-examination.

The COURT.—Sustain the objection.

To which ruling of the Court the defendants excepted and an exception allowed.

(Testimony of J. H. Young.)

WITNESS.—(Continuing.) I do not recollect that after the preliminary examination when I heard that Mr. Gumaer was arrested that I had a talk with Mr. Saxton or any of the deputy marshals or the marshal about fixing the case up so that Gumaer could get out of it if he would turn state's evidence. I did not meet Mr. Gumaer on the street and state to him that I wanted him to go up to the District Attorney and make a clean breast of it, and that I had gotten it all fixed up so that he could get out of it, nothing of that kind. A couple of days after this arrest I heard that he had been arrested and given a fictitious name, and I found out he was the man and I went to him and he denied [99] it and I stated to him at that time, "The best thing for you is to make a clean breast of the thing and square yourself." I never made a statement to the effect that if he did not go I would see he went over the road with the rest of them.

(Witness excused.)

**Testimony of N. B. Nelson, for the Government
(Recalled—Cross-examination).**

Thereupon N. B. NELSON was recalled by defendants for further cross-examination and testified as follows:

Q. (By Mr. GRIGSBY.) Do you know Chas. Mason, one of the men who was arrested with you?

A. Yes, sir.

Q. Did you go to the building where the Arctic Billiard Parlor is, along in March of this year and go to Mr. Mason and wake him up in the night to

(Testimony of N. B. Nelson.)

propose to him that he should stand guard while you robbed the Bourbon Creek dredge by cleaning up the plates of the amalgum that was left?

Mr. SAXTON.—We object to that question as incompetent and immaterial.

The COURT.—Sustain the objection.

To which ruling of the Court the defendants excepted and an exception allowed.

Q. Did you make the same proposition to Frank Martin?

Mr. SAXTON.—Same objection.

The COURT.—Sustained.

To which ruling of the Court the defendants excepted and an exception allowed.

Q. And did you state to each of these gentlemen while you were making that proposition that you had stolen three hundred and eighty dollars from the Plein Dredge?

Mr. SAXTON.—Objected to as incompetent and immaterial.

The COURT.—Sustained.

To which ruling of the Court the defendants excepted and an exception allowed.

Q. (By Mr. SAXTON.) What was your purpose or object in going down to the billiard-parlors, [100] the Arctic, and getting into these games?

A. To locate gambling, if there was any, and to report it, under my instructions, to the marshal.

(Witness excused.)

Testimony of Chas. Mason, for the Government.

And thereupon CHAS. MASON, a witness called for and on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. SAXTON.

My name is Charles Mason. I reside in Nome. I have lived here since 1901. I was one of the parties that was arrested at the time the defendants were arrested in this case. I refuse to answer the question whether I was present in the Arctic Billiard Parlors at the time the defendants were arrested on the ground that it might tend to criminate me. I refuse on the same ground to state to the jury whether or not at the time these defendants were arrested in the Arctic Billiard Parlors I was with Ed Johnson and others engaged in a game of "pan-gingui" being played for chips of money value. I do not know whether or not at that time Mr. Laird, Mr. Skorlich, Mr. Gumaer, Mr. Nelson and Elmer Adams at the same place at another table in that room were engaged in a game of "stud poker" being played with cards and checks of value. I admitted to you I was arrested there.

(Witness excused.) [101]

AND, THEREUPON, Mr. Saxton, U. S. District Attorney, offered in evidence a certain stipulation to which counsel for defendants objected on the ground that the same was immaterial, first waiving any constitutional right that defendants might have as to the right of the defendants to be confronted with witnesses against them, which objection being

overruled, the defendants excepted and an exception was allowed.

AND THEREUPON the said stipulation was offered and received in evidence and marked Plaintiff's Exhibit "H," as follows:

**Plaintiff's Exhibit "H"—Stipulation Re Witnesses
A. Hanson and Elmer Adams.**

*In the District Court for the District of Alaska,
Second Division.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK KOIBETITZ,
JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT,
G. GUMAER,

Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys as follows:

1. That after diligent effort the United States is not able to produce, at the trial of this cause, the following witnesses, to wit: A. Hanson and Elmer Adams.

2. That each of said witnesses, if produced as a witness on the trial of this cause, would refuse to testify to any of the material facts in this cause upon the ground that such evidence would tend to incriminate himself.

3. That this stipulation may be considered in evidence [102] and read to the jury upon the trial of this cause.

F. M. SAXTON,
United States Attorney.
G. B. GRIGSBY,
HUGH O'NEILL,
Attorneys for Defendants.

[Endorsed]: 1036—C. The District Court, District of Alaska, Second Division. The United States vs. Ed Johnson et al. Stipulation. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Apr. 26, 1916. G. A. Adams, Clerk.

AND THEREUPON THE GOVERNMENT
RESTED.

Testimony of Charles Mason, for Defendants.

And thereupon CHARLES MASON, a witness called on behalf of the defendants, and the following proceedings were had:

Mr. GRIGSBY.—We offer to prove the state of facts propounded in my question to Mr. Nelson when he was last on the stand.

Mr. SAXTON.—Objected to as incompetent and immaterial.

The COURT.—Sustain the objection.

To which ruling of the Court the defendants excepted and an exception was allowed. [103]

Testimony of Frank Martin, for Defendants.

Thereupon FRANK MARTIN, a witness produced for and on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. GRIGSBY.

My name is Frank Martin.

Mr. GRIGSBY.—We offer to prove the state of facts indicated by my question to the witness Nelson when he was last on the stand with reference to the same proposition, by this witness.

Mr. SAXTON.—Objected to as incompetent and immaterial.

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception was duly allowed.

Testimony of Merrill Beatty, for Defendants.

And thereupon MERRILL BEATTY was called as a witness on behalf of the defendants, and being duly sworn, testified as follows:

Direct Examination by Mr. GRIGSBY.

My name is Merrill Beatty. I am a bartender. I was working at the Nevada in the month of March and the latter part of February. I know N. B. Nelson, the witness who was on the stand a few minutes ago. I had a conversation with Mr. Nelson along the latter part of February or the first part of March in the Nevada Saloon along somewhere near the middle of the day.

Q. I will ask you to state whether or not in that conversation between you and him in the presence

(Testimony of Merrill Beatty.)

of Ed Young, the proprietor of the Nevada, and Nick Barge, and other persons being present, he stated to you that he had acted as a stool pigeon before? A. He did.

Q. And got paid for it? A. Yes, sir. [104]

Mr. SAXTON.—I move to strike out the answer of the witness and object to the question for the reason it is entirely immaterial.

The COURT.—Motion granted and objection sustained.

To which ruling of the Court the defendants excepted and an exception was allowed.

Mr. GRIGSBY.—We offer to prove the same conversation by Ed Young and Nick Barge.

Mr. SAXTON.—Same objection.

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception was allowed.

And thereupon the following proceedings occurred:

Mr. GRIGSBY.—Defendants move that the Court direct the jury to return a verdict of not guilty as to each of the defendants of the crime charged in the indictment, and both of them, for the reason there is no evidence of any gambling for money except that of the witness N. B. Nelson, who is a self-confessed accomplice, the statute of Alaska providing that a conviction cannot be had upon the uncorroborated testimony of an accomplice.

The COURT.—Motion overruled.

To which ruling of the Court the defendants ex-

(Testimony of Merrill Beatty.)

cepted and an exception was allowed.

Whereupon Mr. Grigsby offered in evidence the transcript of the proceedings of the United States Commissioner's Court of this precinct and division in the case of Ed Johnson, A. C. Laird and others, for the purpose of showing that the defendants, and each of them, have already been tried for the precise offense charged in the indictment.

Mr. SAXTON.—Object to the offer as incompetent, [105] irrelevant and immaterial.

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception was allowed.

The transcript referred to was thereupon marked Defendants' Exhibit 1 for identification and was as follows:

Defendants' Exhibit 1—Information in U. S. A. vs. Johnson in Commissioner's Court.

In the Commissioner's Court for the Precinct of Cape Nome, District of Alaska, Second Division.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, CHAS. MASON, A. HANSON, N. B. NELSON,

Defendants.

Violation of Sec. 2032, Compiled Laws of Alaska—
GAMBLING.

United States of America,
District of Alaska,—ss.

Phil Holland, being first duly sworn, on his oath makes complaint and accuses Ed Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Chas. Mason, Alfred Pierson, B. Garnard, A. Hanson and N. B. Nelson of the crime of gambling, committed as follows: The said Ed. Johnson, A. C. Laird, Frank Koibetitz, [106] John Novosel, Nick Skorlich, Chas. Mason, Alfred Pierson, B. Garnard, A. Hanson and N. B. Nelson, on the 5th day of January, 1916, in the municipality of Nome, and District of Alaska, did wrongfully and unlawfully deal, play, carry on, open, cause to be opened, and conduct a certain game called "Stud Poker," which said game was then and there a game played with cards for money, checks and chips as representatives of value, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

SECOND COUNT.

And the said Phil Holland presents this further information, and complaining of the above-named defendants accuses them of the crime of gambling, committed as follows:

That said defendants Ed Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Chas. Mason, Alfred Pierson, B. Garnard, A. Hanson and N. B. Nelson, on the 5th day of January, 1916, in the municipality of Nome and District of Alaska, did

wrongfully and unlawfully deal, play, carry on, open, cause to be opened, and conduct a certain game called "Pangingi," which said game was then and there a game played with cards for money, checks and chips as representatives of value contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

PHIL HOLLAND.

Subscribed and sworn to before me this 7th day of January, 1916.

[Seal]

JAMES FRAWLEY,

Commissioner and ex-officio Justice of the Peace.

The foregoing information is hereby approved this 8th day of January, 1916.

F. M. SAXTON,

United States Attorney. [107]

[Endorsed]: No. 1610. Commissioner's Court, Cape Nome Precinct, District of Alaska, Second Division. The United States vs. Ed Johnson et al. Information. Filed this 7th day of Jan., 1916. James Frawley, U. S. Commissioner, Justice of the Peace, Nome Precinct, Alaska.

Warrant of Arrest.

in the United States Commissioner's Court for the Precinct of Cape Nome, District of Alaska, Second Division.

United States of America,

District of Alaska,

Precinct of Cape Nome,—ss.

In the Name of the United States of America, to the

United States Marshal of the District of Alaska,
Second Division, or Any Deputy: GREETING:

Information upon oath having been this day laid before me that the crime of Gambling has been committed and accusing Ed Johnson, A. C. Laird, Nick Skorlich, Frank Koibetitz, John Novosel, Chas. Mason, N. B. Nelson, A. Hansen, Alfred Pierson, and B. Garnard thereof,

YOU ARE THEREFORE HEREBY COMMANDED forthwith to arrest the above-named ten persons and bring them before me at the United States Commissioner's courtroom in the city of Nome, precinct of Cape Nome, District of Alaska, or, in case of my absence or inability to act, before the nearest and most accessible magistrate, to answer said complaint and be further dealt with as the law directs.

HEREOF FAIL NOT and make return of this warrant with your doings thereon.

Dated at Nome, Alaska, this 7th day of Jan., 1916.

JAMES FRAWLEY,

Commissioner and Ex-officio Justice of the Peace.

[108]

RETURN.

Received this Warrant on the 7th day of January, 1916, at Nome, and executed the same by arresting the within named Defendants at Nome, the 7th day of January, 1916, and have their bodies now in court, as within I am commanded.

Dated at Nome, Alaska, January 7, 1916.

E. R. JORDAN,

U. S. Marshal.

By Phil Holland,

Deputy.

Marshal's Costs:

10 Services\$40.00

1 Attendance 6.00

[Endorsed]: No. 1610. Commissioner's Court,
Precinct of Cape Nome, Second Division, District of
Alaska. United States of America vs. Ed Johnson.
Warrant. Returned and Filed Jan. 10, 1916. James
Frawley, Commissioner.

Docket of United States Commissioner.

#1610.

THE UNITED STATES OF AMERICA

vs.

ED JOHNSON, A. C. LAIRD, NICK SKORLICH,
FRANK KOIBETITZ, JOHN NOVO-
SEL, CHAS. MASON, N. B. NELSON, A.
HANSEN, ALFRED PIERSON and B.
GARNARD,

Defendants.

F. M. SAXTON, U. S. Attorney, for United
States.

GEORGE B. GRIGSBY, for Defendants.

Complaint made by Phil Holland.

Offense charged vio. sec. 2032—Crim. Code, Alaska—
Gambling.

Offense committed at Nome on the 5th day of January, 1916.

Place of arrest, Nome.

Disposition of case, Held to answer.

Date.

Proceedings.

Jan. 5, 1916. At 11 P. M. the above-named defendants were brought before me by U. S. Deputy Marshals A. B. Miller, Phil Holland, Joel Terrell and Jailor W. H. Jordan on the alleged crime of Gambling. Geo. B. Grigsby appearing [109] for and representing said defendants, requested that the bail bond of defendants for their appearance to plea to said charge be fixed and thereupon the Court fixed the appearance bond of said defendants as follows: Ed Johnson, A. C. Laird, Nick Skorlich, Frank Koibetitz and John Novosel at \$200 each and Chas. Mason, N. B. Nelson, A. Hanson, Alfred Pierson and B. Garnard at \$50 each.

Jan. 5, 1916. N. B. Nelson furnished a cash bond for himself and Chas. Mason in the sum of \$100, and they were both ordered released from custody, a discharge card being given to the Marshal.

Jan. 5, 1916. A check of Russ Downing's for \$250 which was received as cash was fur-

nished as bail for Ed. Johnson and Alfred Pierson, and they were ordered discharged from custody.

\$900 cash was deposited with me by Geo. B. Grigsby as appearance bond for the other six defendants, as follows: \$200 for A. C. Laird; \$200 for Nick Skorlich; \$200 for Frank Koibetitz; \$200 for John Novosel; \$50 for A. Hansen; and \$50 for B. Garnard; and thereupon said defendants were ordered released from custody.

- Jan. 6, 1916. Written undertaking was filed for Ed. Johnson in lieu of cash bail.
- Jan. 6, 1916. Written undertaking was filed for A. C. Laird in lieu of cash bail.
- Jan. 6, 1916. Written undertaking was filed for John Novosel in lieu of cash bail.
- Jan. 6, 1916. Written undertaking was filed for Nick Skorlich in lieu of cash bail.
- Jan. 6, 1916. Written undertaking was filed for Frank Koibetitz in lieu of cash bail. [110]
- Jan. 6, 1916. Written undertaking was filed for A. Hanson in lieu of cash bail.
- Jan. 6, 1916. Written undertaking was filed for Alfred Pierson in lieu of cash bail.
- Jan. 6, 1916. Written undertaking was filed for B. Garnard in lieu of cash bail.
- Jan. 7, 1916. At the hour of 2 P. M., this day, that being the hour for which said hear-

ing was set, the defendants all appeared as their names were called, and Geo. B. Grigsby appeared as attorney for all of said defendants and demanded a jury trial. He contended that this cause was one in which the offense charged, being Gambling, was to be tried and determined by the U. S. Commissioner, as Ex-officio Justice of the Peace and that the Court had no jurisdiction to sit as a U. S. Commissioner and take testimony so as to bind said defendants over to the Grand Jury or to hold them to answer to the District Court in event the evidence produced would tend to show their probable guilt. F. M. Saxton representing the Government resisted the application made by Mr. Grigsby. Hereupon Court adjourned and said cause was continued until Jan. 8, 1916, at 2 P. M.

Jan. 8, 1916. At 2 P. M. this day the parties all appearing and the defendants' atty. Geo. B. Grigsby, argued his application for a jury trial, and F. M. Saxton argued the resistance of said application. Upon the conclusion of said argument the Court denied the application for a trial

by jury, holding that the Court was under the information filed in this case, sitting in the capacity of a U. S. Commissioner as committing magistrate and not as Ex-officio Justice of the Peace with jurisdiction and power to try and determine the case: [111]

Jan. 8, 1916. The following proceedings now took place. The Court proceeded to inform the defendants of their statutory or legal rights, when their attorney for them waived all legal formalities in this respect and announced that they, the defendants, were ready to hear the testimony to be produced by the Government. Whereupon Deputy Marshals Phil Holland and A. B. Miller were sworn and testified in behalf of the Government. At the conclusion of their testimony and during the course of the same, the Government introduced into evidence cards and chips used at the table where they alleged "Pangin-gui" was being played, which was marked as Government "Ex. 1"; also chips and cards from the table where they alleged Stud Poker was being played as Government Ex. 2; also the two tables at which it was

alleged the defendants were playing when arrested as Government "Ex. 3"; also 4 cardboard boxes with playing cards contained therein and wooden box with a miscellaneous lot of chips as Government's "Ex. 4." Whereupon the Government rested its case. Geo. B. Grigsby moved that the defendants be discharged, the evidence produced being insufficient to hold the defendants to answer. This motion was overruled by the Court and the defendants' attorney then stated that they did not wish to produce or introduce any evidence and rested their case. Whereupon the Court took an adjournment and this case was continued until Jan. 10, 1916, at 3 P. M.

Jan. 10, 1916. At 3 P. M. this day the defendants, and each of them, appeared with their attorney Geo. B. Grigsby, and F. M. Saxton appeared for the Government. Said case being called, F. M. Saxton moved that the case against [112] Chas. Mason, A. Hanson and N. B. Nelson be dismissed and their bonds released, which motion was granted and said three defendants were discharged. Geo. B. Grigsby renewed his mo-

tion or application for a jury trial, which motion or application was overruled.

All the testimony having been submitted to the Court and the Court finds therefrom that there is sufficient cause to believe that the defendants Ed. Johnson, A. C. Laird, Nick Skorlich, Frank Koibetitz, John Novosel, Alfred Pierson and B. Garnard are guilty of the offense charged. Now therefore it appearing to me from the testimony produced before me on the examination that the crime of Gambling has been committed and that there is sufficient cause to believe E. Johnson, A. C. Laird, Nick Skorlich, Frank Koibetitz, John Novosel, Alfred Pierson and B. Garnard are guilty thereof, therefore I order each of them to be held to answer the same and I place their bail or appearance bond at \$250 each and said defendants are remanded to the custody of the U. S. Marshal until said bond is furnished or they are otherwise legally discharged therefrom.

Dated: Nome, Alaska, Jan. 10, 1916.

JAMES FRAWLEY,

U. S. Commissioner.

- Jan. 10, 1916. Ed. Johnson filed his written bond with G. A. Hall and Fred Daniels, sureties.
- Jan. 10, 1916. A. G. Laird filed his written bond with G. A. Hall and Henry Burgh, sureties.
- Jan. 10, 1916. Nick Korlich filed his written bond with Milo Sladovich and Albert Nicholson, sureties.
- Jan. 10, 1916. Frank Koibetitz filed his written bond with F. J. Kriek and Con Seibel, sureties. [113]
- Jan. 10, 1916. John Novosel filed his written bond with Milo Sladovich and Henry Burg, sureties.
- Alfred Pierson filed his written bond with Albert Nicholson and A. G. Oliver, sureties.
- B. Garnard filed his written bond with F. J. Krick and A. G. Oliver, sureties.
- Commissioner's costs, \$36.

Territory of Alaska,

Cape Nome Precinct,—ss.

I, James Frawley, United States Commissioner and Ex-officio Justice of the Peace in and for the Precinct aforesaid, DO HEREBY CERTIFY that the foregoing is a true and complete transcript of the proceedings had before me upon the examination of Ed. Johnson, A. C. Laird, Nick Skorlich, Frank Koibetitz, John Novosel, Charles Mason, N. B. Nelson, A. Hanson, Alfred Pearson and B. Gernard, charged

with the crime of gambling, and that annexed hereto are the original Warrant, Information and Undertaking on Bail in said action and also sent herewith to the Clerk of the District Court the exhibits introduced therein as follows: Exhibit "I" Cards and Chips used at table where it was alleged "Pangengi" was being played; Exhibit "2," Chips and Cards from table where it was alleged Stud Poker was being played; Exhibit "3" Tables (2) at which it was alleged defendants were playing when arrested; Exhibit "4," four cardboard boxes with playing cards contained therein and a wooden box with a miscellaneous lot of chips.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 10th day of January, A. D. 1916.

[Seal]

JAMES FRAWLEY,

United States Commissioner and Ex-officio Justice of the Peace. [114]

Mr. GRIGSBY.—I now offer to prove by Mr. Saxton, the District Attorney, the proceedings which took place at the preliminary hearing and to show by him that the defendants have already had a trial for the precise crimes charged in the indictment, the witness Saxton being present in court.

Mr. SAXTON.—Same objection.

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception allowed.

Testimony of John Nestor, for Defendants.

And thereupon JOHN NESTOR, a witness produced for and on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. GRIGSBY.

My name is John Nestor. I was a member of the last grand jury in this division, the one that brought in the indictment against the defendants in this case. I remember the gambling case that was being investigated by the grand jury. The grand jury had occasion, in order to get the testimony of N. B. Nelson, to go to his cabin in order to examine him. I was present at that examination and heard his testimony. I do not recollect the substance of it. To the best of my recollection he stated that his reason for reporting the gambling at the Winsor or Arctic Billiard Hall to the marshal's office was that he did not like the game, that he wasn't getting a square deal or words in substance to that effect. I don't remember just exactly the words.

Cross-examination by Mr. SAXTON.

I recollect that Mr. Nelson made a statement with reference to a game in which the defendant Johnson took a card from one of the players, but as to whether he stated he [115] was in the game himself or not, I don't remember. My recollection is that he stated he was in the game. I know it was some cards he was talking about, and I think he said he saw cards coming from somewhere else. To the best of my recollection he was at the table, but whether he was in the

(Testimony of John Nestor.)

game or not I would not say. That is all that I recollect he stated about any unfair game was just that one circumstance.

Redirect Examination by Mr. GRIGSBY.

Q. But he did give that as his reason for reporting the game?

WITNESS.—(Continuing.) I think the question was asked him, I am not sure. I think the District Attorney asked him and I think that is what he gave as his reason, he could not see how he could win or something like that. I don't remember the exact words. I don't recollect now whether he had been asked several questions before he admitted he had been hired to go down there. I think his testimony was that he complained to the marshal about it. Maybe not, I don't know. I would not want to say as to that. There was some talk upon that line, but I don't remember whether that was it or not.

Q. Isn't it a fact that when he was first examined he said there was something about the game he did not like and for that reason he complained, and didn't Mr. Saxton then take him in hand and say, "You were hired by the marshal to go down there?"

Mr. SAXTON.—Object to that. It is entirely immaterial. This is an impeaching witness.

The COURT.—Sustain the objection.

To which ruling of the Court the defendants excepted and an exception allowed. [116]

Recross-examination by Mr. SAXTON.

I don't remember for certain what he said. I know he mentioned about getting money, that the

(Testimony of John Nestor.)

marshal paid him money, that is the impression I had. Whether it was his own money or the marshal owed him, I don't remember. I don't remember what he said about that.

(Witness excused.)

Whereupon court was adjourned until Saturday morning, at 10 o'clock, April 29th, 1916.

And thereupon, upon convening of court Saturday morning at 10 o'clock, April 29th, 1916, the following proceedings were had:

Testimony of Perry Moore, for Defendants.

PERRY MOORE, a witness produced for and on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. GRIGSBY.

My name is Perry Moore. I worked for Henry Burgh at his saloon last winter along shortly before Christmas. I know Phil Holland, a deputy marshal. I heard a conversation in Henry Burgh's saloon, the Eagle, along shortly before the holidays between Phil Holland and Ed Johnson, in the presence of myself, in which Phil Holland stated to the defendant Johnson, "I am going after you and I am going to get you." Those are practically the words he used.

Cross-examination by Mr. SAXTON.

I stated I heard those words used, or practically those words. I would not be positive about the exact words, but in sum and substance that is what he said. I was probably twenty inches from them, very close. I didn't hear anything mentioned by Mr. Holland

(Testimony of Perry Moore.)

about his getting his tools or anything to that effect. I didn't understand it [117] that way, no, sir.

(Witness excused.)

The foregoing is all of the testimony which was given and admitted on the trial of said cause.

DEFENDANTS REST.

GOVERNMENT RESTS.

Whereupon the case was argued to the jury by F. M. Saxton on behalf of the plaintiff, and by George B. Grigsby and Hugh O'Neill on behalf of the defendants, and during the argument of said F. M. Saxton the following proceedings were had:

In making his closing argument to the jury F. M. Saxton said:

"Gentlemen of the Jury, the witness Chas. Mason, one of the men who was arrested together with the defendants in this case, has been sworn as a witness in this cause and when asked with reference to what was going on in the Arctic Billiard Parlor at the time of the arrest, in his presence, refused to answer on the ground that said answer might tend to criminate him. Gentlemen of the Jury, what was going on there at that time that he was unwilling to tell about for fear it might incriminate him? You know perfectly well what was going on. There was a crime being committed there, and you know perfectly well what crime it was."

Whereupon George B. Grigsby excepted to the remarks as being prejudicial to the defendants and asked the Court to instruct the jury that such comment was improper and so disregard the same, which

the Court then and there refused to do, to which ruling the defendants excepted and an exception was allowed.

And thereupon the argument being concluded the Court charged the jury in writing as follows: [118]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOI-
BETITZ, JOHN NOVOSEL, NICK SKOR-
LICH, ALFRED PIERSON, ADELBERT
C. GUMAER,

Defendants.

Court's Instructions to the Jury.

GENTLEMEN OF THE JURY:

The defendants are charged by the first count of the indictment in this case with dealing, playing, carrying on, opening, causing to be opened and conducting a game called "stud poker," and by the second count of said indictment in this case with dealing, playing, carrying on, opening, causing to be opened and conducting a game called "Pangingi."

Section 2032 of the Compiled Laws of Alaska is the one under which this case is prosecuted. Each and every person who shall deal, play, carry on, or cause to be carried on, or conduct, either as owner, proprietor, or employee, whether for hire or not, any game played with cards, dice, or any other device,

whether the same shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor.

To this indictment the defendants have entered a plea of not guilty and you are instructed that such plea puts the burden of proof upon the prosecution to establish every essential allegation of the indictment beyond reasonable doubt. [119]

2.

There are seven defendants in this case and it becomes your duty to consider each one of them separately in relation to the crime charged under the evidence and instructions in this case. All or any number of them may be innocent or all or any number of them may be guilty on one or both of the counts charged. That is for you to determine from the evidence under these instructions. And in determining the guilt or innocence of any one of these defendants, you should consider the evidence and these instructions in their relation to such defendant as if such defendant were the only defendant in the case. Hence when I have used the word "defendant" in these instructions you will understand that the same is used to represent each of the defendants when his guilt or innocence is under consideration by you.

3.

The essential elements of the crime of gambling are:

1st. That the game was played with cards, dice or other device;

2d. That such game was played for money, checks, chips, credit, or other representative of value;

3d. That the defendant was connected with such game as a dealer, player, owner, proprietor, or employee or lessee of the room in which such game was conducted;

4th. That said game was played in the Second Division of Alaska within three years prior to the date of filing the indictment in the case;

5th. That if defendant was not connected with such game as dealer, player, owner, proprietor or employee, but was the owner or lessee of the room in which the game was played, then that defendant knew that gambling was being conducted in said room. [120]

4.

In a criminal cause the Judge and jury of this court have important though separate functions to perform. It is your duty to hear all of the evidence and to decide thereupon all questions of fact. Sometime it is attempted to introduce testimony which for legal reasons the Court refuses to permit. You will not consider any such matter or any knowledge or information known to you concerning the case and not derived from evidence given upon the witnessstand in arriving at your verdict. It is the duty of the Judge of this court to instruct you upon the law applicable to the case and the statute makes it your duty to accept as law what is laid down by the Court as such in these instructions, and if you should knowingly refuse to do so you would be liable as for contempt of court.

5.

Each of the defendants in this case is presumed to

be innocent until he is proven guilty. If upon such proof there be reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after a full, free, and careful examination and comparison of all the evidence. It must be such a doubt as would cause a careful, considerate and prudent man to pause and consider before acting in the careful and most important affairs of life. A certainty that convinces and directs the understanding and satisfies a reasonable judgment would be proof beyond a reasonable doubt. If you believe as reasonable men you should not disbelieve as jurors. [121]

This does not mean that every element of the crime charged must be proven by direct and positive evidence. Facts may be proven by indirect or circumstantial evidence, or may be a presumption arising from the facts proven. If you are satisfied beyond a reasonable doubt that your conclusion is correct that is sufficient whether based upon direct proof, indirect or circumstantial proof, or from a presumption arising from other facts proven.

51½.

I instruct you that the testimony of one witness, if believed by you, is sufficient to establish any material fact in the case unless such witness is an accomplice. If you believe from the evidence that the witness N. B. Nelson was employed by the United States Marshal for this division to engage in the apprehension of persons violating the law by gambling, and that in pursuance of said employment the said Nel-

son engaged in a gambling game, if any, with the defendants, then I instruct you that said Nelson is not an accomplice with the defendants, and you should give his testimony the same weight and consideration as you would have done if he had been present and had testified to the same matters without participating in the game.

On the other hand if you believe from the evidence that the said witness N. B. Nelson was not employed by the United States Marshal or that he did not engage in the gambling game, if any, with the defendants for the purpose of apprehending them, then I instruct you that he was an accomplice and his testimony connecting the defendants with the game, if any, must be corroborated by some other evidence which tends to connect the defendants with the game. However, his testimony as to the character and elements of the [122] game need not be corroborated even though he be an accomplice. In other words the testimony of an accomplice is sufficient, if you believe it, to establish that a certain game played with cards for money, checks, chips or credits of value was being played at a certain time and place, without any corroboration whatever. But his testimony as to who was engaged in or connected with the game, if any, must be corroborated by some other evidence tending to connect the defendants with the game.

Hence, the testimony of said witness, N. B. Nelson, whether you find that he was an accomplice or not, if you believe it, is sufficient to establish the kind of a game that was being played, if any; the means

or instrumentalities used in playing such game, if any; the nature and value of the "stakes" for which such game was being played, if any. However, his testimony, if any, connecting the defendants with the game, must be corroborated as heretofore stated, in case you find him to be an accomplice, but not otherwise.

51½A.

The Government has introduced certain evidence in this case tending to show that the defendants were playing for certain chips on which the value in trade of each chip is printed. I instruct you that the printing on each of such chips is sufficient evidence to establish the value thereof, since no evidence has been introduced to explain or contradict the printing thereon. [123]

6.

You are the sole judges of the credibility of witnesses and the weight to be attached to their testimony. This power is not to be exercised arbitrarily by you, but with reasonable discretion and in subordination to the rules of evidence. You may take into consideration the interest the witness has, if any, in the result of the trial, his bias or prejudice if either appear, his mental capacity and his means for knowing that about which he testifies, the reasonableness or unreasonableness of his statements, his demeanor on the witness-stand, his candor or evasion, and then applying your knowledge of human actions and motives you will determine where the truth lies and find accordingly.

You are instructed that you are not bound to find

in conformity with the testimony of any number of witnesses which do not produce a conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

If you believe that any witness in this case has testified falsely in one part of his testimony you are at liberty to reject all of his testimony, but you are not bound to do so. You should reject the false part and may give such weight to other parts as you think they are entitled to receive.

6.

If you should find under the foregoing instructions that any of the witnesses in this case are accomplices, then I instruct you that the testimony of an accomplice ought to be viewed with distrust. [124]

6½.

You are instructed that the oral admissions of a party are to be viewed with caution.

6½A.

Our statute provides that in the trial of a criminal case, the person accused shall at his own request, but not otherwise, be deemed a competent witness, but if the defendant or accused waives his right to testify in the case, such waiver shall not create any presumption against him.

7.

The owner or lessee of a building or room cannot lease or sublet such building or room for an unlawful purpose, or knowingly permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts transpiring in such building or room. If you should find from the

evidence in this case that one of the defendants held the room in which gambling is alleged to have been conducted under a lease from the owner, and you further find that gambling as alleged was being conducted there, then I instruct you that such owner or lessee is guilty if he knew that such gambling was being carried on there whether he had any connection with the game or not.

It follows, therefore, that if you find gambling was being carried on in the room known as the Arctic Billiard Room or Parlor, and that said room was held by defendant under a lease from the owner, either oral or written, then I instruct you that such defendant is guilty if he knew that such room was being used for the purpose of gambling, and a game of stud poker [125] or pangingi played with cards for money or chips of value was had in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist.

Again if you find that a game of stud poker or pangingi was played with cards for money or chips of value on the night in question, in said room, and the defendant had anything to do with said game such as dealer, player, owner, proprietor or employee, then I instruct you that the defendant is guilty, and it does not matter whether he was the lessee or owner of said room and had previous knowledge of said game or not.

8.

I have permitted evidence to be introduced in this case tending to show gambling to have been carried on

in the room known as the Arctic Billiard-room at other times prior to the time alleged for the purpose of establishing the knowledge of the owner and lessee of said room that gambling was being carried on there, and you should consider it for no other purpose. As to what extent such testimony tends to show such knowledge on the part of defendant is for you to determine.

9.

There has been some testimony tending to show that the defendant, Ed. Johnson, has made statements to the effect that he intended to gamble in spite of law and the efforts of officials to stop him. You should consider this testimony only [126] in determining the guilt or innocence of said defendant, Ed. Johnson. You should not consider it as affecting the guilt or innocence of the other defendants.

9½A.

There has been some testimony tending to show that the defendant, Adelbert G. Gumaer, made an admission of his guilt in the presence of the witness, J. H. Young. You should consider this testimony only in determining the guilt or innocence of said defendant Gumaer, and not as affecting the other defendants.

9½B.

The defendants have entered a plea of former conviction in this case, but there being no evidence admitted upon that plea, I instruct you that you are not to give the same any consideration.

10.

I submit to you three forms of verdict. If you

should find all of the defendants guilty of both counts of the indictment you should return the verdict finding all of the defendants guilty as charged. If you should find that no one of the defendants is guilty of either count in the indictment, then you should return the verdict finding all of the defendants "not guilty." If you should find the defendants "guilty" of one count only of the indictment, and "not guilty" of the other count, or you should find some of the defendants guilty of both counts [127] and the others not guilty of both, then you should return the third form of verdict filling in the names of the defendants whom you find guilty, if any, in your verdict on each count of the indictment in the blank space left for that purpose; and likewise filling in the names of the defendants not guilty in the blank space left for that purpose.

When you have retired to your jury-room and have agreed upon your verdict, you should have your foreman, to be selected by yourselves, sign the one upon which you unanimously agree and return it into court as your verdict in this case.

You may take into the jury-room for your guidance these instructions, the exhibits, and the indictment.

Let the bailiffs be sworn.

You may now retire, gentlemen, to deliberate upon your verdict.

J. R. TUCKER,
District Judge. [128]

AND THEREUPON in the presence of the jury and before they retired to consider their verdict, the

defendants took the following exceptions to the instructions of the Court and for the refusal of the Court to give certain instructions, as follows:

Exceptions to Instructions of the Court and to Refusal to Give Certain Instructions.

1. Defendants except to the following charge given by the Court in his instructions to the jury:

“It is the duty of the Judge of this court to instruct you upon the law applicable to the case and the statute makes it your duty to accept as law what is laid down by the Court as, such in these instructions, and if you should knowingly refuse to do so you would be liable as for contempt of court.”

For the reason that said instruction is against law and prejudicial to the defendants in that said instruction tended to coerce the jurors to agree upon a verdict and tended to cause the jurors to fear punishment in the event of failing to agree upon a verdict or in the event of failing to find defendants guilty.

2. Defendants except to the following instruction given by the Court to the jury:

“I instruct you that the testimony of one witness, if believed by you, is sufficient to establish any material fact in the case unless such witness is an accomplice. If you believed from the evidence that that witness N. B. Nelson was employed by the United States Marshal for this Division to engage in the apprehension of persons violating the law by gambling, and that in pursuance of said employment [129] the said Nelson engaged in a gambling game, if any, with the defendants, then I in-

struct you that said Nelson is not an accomplice with the defendants, and you should give this testimony the same weight and consideration as you would have done if he had been present and had testified to the same matters without participating in the game.

On the other hand, if you believe from the evidence that the said witness N. B. Nelson was not employed by the United States Marshal or that he did not engage in the gambling game, if any, with the defendants, for the purpose of apprehending them, then I instruct you that he was an accomplice and his testimony connecting the defendants with the game, of any, must be corroborated by some other evidence which tends to connect the defendants with the game. However, his testimony as to the character and elements of the game need not be corroborated even though he be an accomplice. In other words the testimony of an accomplice is sufficient, if you believe it, to establish that a certain game played with cards for money, checks, chips or credits of value was being played at a certain time and place, without any corroboration whatever. But his testimony as to who was engaged in or connected with the game, of any, must be corroborated by some other evidence tending to connect the defendants with the game.

Hence, the testimony of said witness N. B. Nelson, whether you find that he was an accomplice or not, if you believe it, is sufficient to establish the kind of a game that was being played if any; the means or instrumentalities used in playing such

game, if any; and the nature and value of the "stakes" for which such game was being played, if any. However, his testimony, if any, connecting the defendants with the game, must be corroborated as heretofore stated, in case you find him to be an accomplice, but not otherwise."

For the reason that said instruction is against law.
[130]:

3. Defendants except to the following instruction given by the Court to the jury;

"The Government has introduced certain evidence in this case tending to show that the defendants were playing for certain chips on which the value in trade of each chip is printed. I instruct you that the printing on each of such chips is sufficient evidence to establish the value thereof, since no evidence has been introduced to explain or contradict the printing thereon."

For the reason that said instruction is against law, and for the reason that said instruction contains an incorrect statement as to the evidence introduced in the case, the witness N. B. Nelson having testified as to the value of the chips referred to and having placed a different value thereon than that indicated by the printing on said chips.

4. Defendants except to the following instruction given by the Court to the jury:

"The owner or lessee of a building or room cannot lease or sublet such building or room for an unlawful purpose, or knowingly permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts tran-

spiring in such building or room. If you should find from the evidence in this case that one of the defendants held the room in which gambling is alleged to have been conducted under a lease from the owner, and you further find that gambling as alleged was being conducted there, then I instruct you that such owner or lessee is guilty if he knew that such gambling was being carried on there whether he had any connection with the game or not.

It follows therefore, that if you find gambling was being carried on in the room known as the Arctic Billiard-room [131] or Parlor, and that said room was held by defendant under a lease from the owner, either oral or written, then I instruct you that such defendant is guilty if he knew that such room was being used for the purposes of gambling, and a game of stud poker or pangingi played with cards for money or chips of value was held in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist.

Again, if you find that a game of stud poker or pangingi was played with cards for money or chips of value on the night in question, in said room, and the defendant had anything to do with said game such as dealer, player, owner, proprietor, or employee, then I instruct you that the defendant is guilty, and it does not matter whether he was the lessee or owner of said room and had previous knowledge of said game or not."

For the reason that same is against the law.

5. Defendants except to the following instruc-

tion given by the Court to the jury:

"I have permitted evidence to be introduced in this case tending to show gambling to have been carried on in the room known as the Arctic Billiard-room at other times prior to the time alleged, for the purpose of establishing the knowledge of the owner and lessee of said room that gambling was being carried on there and you should consider it for no other purpose. As to what extent such testimony tends to show such knowledge on the part of the defendant is for you to determine."

For the reason that same is against the law.

6. Defendants except to the following instruction given by the Court to the jury:

"There has been some testimony tending to show that the defendant, Ed. Johnson, has made statements to the effect that he intended to gamble in spite of law and the efforts of [132] officials to stop him. You should consider this testimony only in determining the guilt or innocence of said defendant, Ed Johnson. You should not consider it as affecting the guilt or innocence of the other defendants."

For the reason that same is against the law.

And the Court refused to give the following instruction requested by the defendants:

"You are instructed that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendants with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the cir-

cumstances of the commission.”

To the refusal of the Court to give such instruction the defendants excepted and an exception allowed.

And the Court refused to give the following instruction requested by the defendants:

“You are instructed that if you believe from the evidence in this case the witness N. B. Nelson to have been an accomplice of the defendants, or any of them, with relation to the crime or crimes charged in the indictment, then you are instructed that unless the evidence of the witness N. B. Nelson with relation to the crime charged be corroborated by other evidence tending to show that the defendants, or some of them, actually played cards for money, then you should acquit.

It is not sufficient, in case you find N. B. Nelson to have been an accomplice, that his evidence be corroborated with respect [133] to matters which do not necessarily involve the guilt of the accused. He must be corroborated in matters which bear directly upon the guilt of the accused of the offense of gambling.”

To the refusal of the Court to give such instruction the defendants excepted and an exception allowed.

And the Court refused to give the following instruction requested by the defendants:

“The indictment in this case charges the defendants with having played certain games of cards for money at the time and place charged in the indictment. If you are satisfied from the evidence that

the defendants, or any of them, did actually play the game of cards mentioned in the indictment at the time and place charged, then it will be for you to determine whether or not such game or games were played for money or representative of value and in determining this necessary element of the crime charged, you are instructed that a conviction cannot be had upon the uncorroborated testimony of an accomplice and if you should find from the evidence that the witness N. B. Nelson was an accomplice and there is no other testimony in the case than his tending to prove that gambling actually took place, then it will be your duty to acquit the defendants.”

To the refusal of the Court to give such instruction the defendants excepted and an exception allowed.

And the Court refused to give the following instruction requested by defendant:

“You are instructed that the testimony of an accomplice should be viewed with distrust.”

To the refusal of the Court to give such instruction the defendants excepted and an exception allowed. [134]

And the Court refused to give the following instruction requested by the defendants:

“Evidence has been introduced in this case tending to show that one Charles Mason was present in company with the defendants at the time of the arrest of the defendants for the crime charged in the indictment. The said Charles Mason was called as a witness for the Government in this case and re-

refused to answer certain material questions propounded to him basing his refusal on the ground that his answer to the questions might tend to criminate him.

You are instructed that you are not to draw any inference prejudicial to the defendants in this case on account of said refusal on the part of said Mason to answer such questions, and such refusal should in no way be considered by you in determining the guilt or innocence of the defendants, or any of them."

To the refusal of the Court to give such instruction the defendants excepted and an exception allowed.

And the Court refused to give to the jury the following instruction requested by defendants:

"You are instructed with reference to a certain stipulation introduced in evidence in this case and marked Plaintiff's Exhibit 'H,' which stipulation is to the effect that certain witnesses, if present, would refuse to answer any material questions propounded to them, basing their refusal on the ground that their answers to such questions might tend to criminate them, that such stipulation has no probative force whatever and should not be considered by you at all in determining the guilt or innocence of the defendants, and that if the witnesses mentioned in said stipulation had been present in court and refused to answer on the grounds mentioned, such refusal would in no way tend to prove the guilt of the defendants."

To which refusal defendants excepted and an exception [135] allowed.

And the Court refused to give to the jury the following instruction requested by the defendants:

“You are instructed that the defendants are presumed to be innocent until their guilt is established to a moral certainty and beyond a reasonable doubt. They are clothed with this presumption, not only at the outset but during all stages of the trial and until the jury determines otherwise.”

To which refusal of the Court the defendants excepted and an exception allowed.

And the Court refused to give to the jury the following instruction requested by the defendants:

“The evidence in this case shows that E. R. Jordan paid the witness N. B. Nelson a sum of money out of his own personal funds to investigate gambling conditions in the town of Nome. You are instructed that no private person can hire another to participate in a criminal offense even though such participation be for the purpose of detecting other guilty persons and relieve such participant from criminal responsibility, therefore if you believe from the evidence that E. R. Jordan hired the witness Nelson and paid him out of his own personal funds and that the said Nelson participated in the game pursuant to said employment, the said Nelson would be and is an accomplice of all engaged in said game.”

To which refusal defendants excepted and an exception allowed. [136]

AND THEREUPON the jury having retired for deliberation upon Saturday the 29th day of April,

1916, at the hour of 3 o'clock P. M. and having returned into court on Monday, the 1st day of May, 1916, and having reported to the Court that they were unable to agree upon a verdict, the Court thereupon read to the jury the following instruction which was in writing:

"GENTLEMEN OF THE JURY:

Upon the evidence and instructions in this case you should be able to reach a verdict.

The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.

Now, I shall give you a longer time for a further and more serious consideration of this case. When you retire to the jury-room again read over the instructions of the court carefully and if there is anything about them you do not understand, so advise the Court and I will endeavor to make the same plain to you. It is your duty to arrive at a verdict in the case according to the evidence and the instructions given you, irrespective of all other considerations.

You may now retire for further consideration of the case.

J. R. TUCKER,
Judge."

May 1, 1916.

To which instruction defendants then and there excepted on the ground that said instruction was an attempt to influence the jury to return a verdict against their consciences, the jury then having been deliberating for more than forty (40) hours; [137]

And thereafter, on said first day of May, 1916, the jury in this case came into open court and rendered the following verdict.

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT G. GUMAER,

Defendants.

Verdict.

We, the trial jury, duly empaneled to try the above-entitled cause, find the defendants Ed Johnson and A. C. Laird guilty as charged in the first count of the indictment, and the defendants Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson, Adelbert G. Gaumaer, not guilty on said first count.

And we further find the defendants Ed Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson, Adelbert G. Gumaer, not guilty on said second count.

M. LOERPABEL,

Foreman.

Which verdict was received by the Court and ordered filed as the verdict of the jury. [138]

AND THEREAFTER, on the 5th day of May, 1916, upon the foregoing verdict, judgment was ren-

dered against the defendants Ed Johnson and A. C. Laird as follows:

In the District Court, District of Alaska, Second Division.

No. 1036.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT G. GUMAER,

Defendants.

Judgment.

Now, at this time this cause coming on in open court for the passing of sentence and judgment in this case, the defendants Ed Johnson and A. C. Laird, appearing in person and by Geo. B. Grigsby and Hugh O'Neill, their counsel, and the United States appearing by F. M. Saxton, United States Attorney for the Second Division of the District of Alaska, and it appearing to the Court that heretofore on the 6th day of April, 1916, the grand jury returned and filed in the above-entitled court an indictment charging above-named defendants with the crime of gambling in two counts, and it further appearing that thereafter on the 8th day of April, 1916, said defendants appearing in person and by their said counsel in open court and were duly arraigned, and thereafter on the 11th day of April,

1916, the Court having overruled defendants' motion to quash and demurrer to said indictment the said defendants appeared in person and pleaded "not guilty" to said indictment, and thereafter on the 26th day of April, 1916, said cause coming on regularly for trial, and the said defendants appearing in person and by their said counsel, and a jury having been duly and regularly empaneled, and witnesses sworn and examined, and said cause having been argued by counsel, and said jury having [139] been instructed by the Court, and said cause having been on the 29th day of April, 1916, submitted to said jury, and said jury thereafter on the first day of May, 1916, having returned against said defendants Ed Johnson and A. C. Laird, a verdict of guilty of the crime charged in the first count, of the said indictment, and the said Court at said time having fixed the 5th day of May, 1916, at 10 o'clock A. M. as the time for imposing sentence upon said defendants, and the said time having now arrived, and the said defendants appearing in person and by their said counsel and interposing no reason why sentence should not now be pronounced,—

IT IS NOW THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant Ed Johnson be, and he hereby is, fined in the sum of Five Hundred Dollars (\$500) and that the United States as plaintiff herein have judgment against the said defendant Ed Johnson for the sum of said fine of \$500 and the costs of this action taxed at \$364.95, and that in default of the payment of said fine and costs the said defendant be imprisoned in the Fed-

eral Jail at Nome, Alaska, one day for each two dollars thereof, not exceeding one year.

AND IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that the defendant A. C. Laird be, and he hereby is fined in the sum of Five Hundred Dollars (\$500) and that the United States as plaintiff herein have judgment against the said defendant A. C. Laird for the sum of said fine of \$500 and the costs of this action taxed at \$364.95, and that in default of the payment of said fine and costs the said defendant be imprisoned in the Federal Jail at Nome, Alaska, one day for each two dollars thereof, not exceeding one year.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that said judgments including said fine and costs be docketed [140] against each of the defendants as in case of judgments in civil causes, and that plaintiff have execution therefor; that said judgment for costs shall be joint and several against the said defendants.

IT IS FURTHER ORDERED that said defendants be, and they hereby are remanded to the custody of the United States Marshal for the Second Division of Alaska for the execution of these judgments.

And it further appearing to the court that the United States Marshal for this division did take from the possession of said defendants at the time at which the crime was committed upon which the said defendants have been convicted, and from the room in which said crime was committed, then and there being used by the defendants in gambling, the

following described gambling implements, to wit:

1 deck of cards, being Plaintiff's Exhibit "A" herein;

1 bunch of chips, being Plaintiff's Exhibit "B" herein;

8 decks of cards, being Plaintiff's Exhibit "C" herein;

1 bunch of chips, being Plaintiff's Exhibit "D" herein;

1 box cards and chips, Plaintiff's Exhibit "E" herein;

1 stud poker-table, Plaintiff's Exhibit "F" herein;

1 Panginge table, Plaintiff's Exhibit "G" herein.

IT IS THEREFORE FURTHER CONSIDERED, ORDERED AND ADJUDGED that the United States Marshal for the Second Division of the District of Alaska be, and he hereby is authorized and directed to destroy the said gambling implements and all thereof, and a certified copy of this order shall be his authority and warrant for so doing.

Dated at Nome this 5th day of May, 1916.

J. R. TUCKER,
District Judge. [141]

Whereupon the defendants then and there excepted to said judgment which exception was then and there allowed.

And now in furtherance of justice and that right may be done, the defendants tender and present the foregoing as their bill of exceptions in the above-entitled cause, and pray that the same may be settled and allowed, and that the same may be signed and

certified to by the above-entitled court and become and be made a part of the record in the above-entitled cause.

GEORGE B. GRIGSBY,
HUGH O'NEILL,

Attorneys for Defendants.

Service of the within and foregoing Bill of Exceptions admitted this 31st day of May, 1916.

F. M. SAXTON,
U. S. District Attorney. [142]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON and ADELBERT G. GUMAER,

Defendants.

Order Settling and Allowing Bill of Exceptions.

The foregoing bill of exceptions having been served, filed and presented for settlement within the time allowed by law, and being full, true and correct, and containing all the evidence introduced at the trial, the same is hereby settled and allowed.

Done at Nome, Alaska, this 7th day of June, 1916.

J. R. TUCKER,
District Judge.

[Endorsed]: In the District Court for the District of Alaska, Second Div., United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, et al., Defendants. Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 31, 1916. G. A. Adams, Clerk. By ———, Deputy, F. W. L. Refiled in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 7, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. George B. Grigsby and Hugh O'Neill, Attys. for Defendants. [143]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
TITZ, JOHN NOVOSEL, NICK SKOR-
LICH, ALFRED PIERSON and ADEL-
BERT G. GUMAER,

Defendants.

**Order Extending Time to Prepare, etc., Bill of
Exceptions, Until and Including May 29, 1916.**

IT IS HEREBY ORDERED AND DIRECTED that the time within which defendants herein may prepare, serve and file the bill of exceptions in the above-entitled action is extended until and including the 29th day of May, 1916.

Dated at Nome, Alaska, this 23d day of May, 1916.

J. R. TUCKER,
District Judge.

[Endorsed]: In the District Court for the District of Alaska, 2d Div. United States of America, Plaintiff, vs. Ed. Johnson et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 23, 1916. G. A. Adams, Clerk. By _____, Deputy. F. W. L. Orders and Judgments, vol. 11, page 244. [144]

*In the District Court for the District of Alaska,
Second Division.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON and ADELBERT G. GUMAER,

Defendants.

Order Extending Time to Prepare, etc., Bill of Exceptions, Until and Including May 31, 1916.

IT IS HEREBY ORDERED AND DIRECTED that the time within which defendants herein may prepare, serve and file the bill of exceptions in the above-entitled action is extended until and included the 31st day of May, 1916.

Dated at Nome, Alaska, this 29th day of May, 1916.

J. R. TUCKER,
District Judge.

[Endorsed]: 1036. In the District Court for the District of Alaska, 2d Div. United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 29, 1916. G. A. Adams, Clerk. By ———, Deputy. L. Orders and Judgments, vol. 11, page 245. [145]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. L. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, ALFRED PIERSON and ADELBERT G. GUMAER,

Defendants.

Assignment of Errors.

Come now the defendants Ed. Johnson and A. C. Laird, plaintiffs in error, and file the following assignment of errors upon which they will rely in their prosecution of the writ of error in the above-entitled cause:

I.

The Court erred in overruling the defendants' de-

murrer to the indictment in this case, which demurrer was on the following grounds:

1st. That said indictment does not state facts sufficient to constitute a crime.

2d. That more than one crime is charged in said indictment.

3d. That two offenses are improperly joined in said indictment.

4th. That said indictment does not substantially conform to the requirements of Chapter VII, Title 15 of the Compiled Laws of Alaska.

5th. That there is a misjoinder of parties defendant in said indictment.

II.

That the Court erred in overruling the defendants' motion to quash the indictment in this case, which motion and affidavit in support thereof were as follows: [146]

Motion to Quash.

Come now the defendants in the above-entitled cause by and through their attorneys, George B. Grigsby and Hugh O'Neill, and move the Court to quash the indictment herein on the following ground:

That said defendants and each of them have been once in jeopardy for each of the offenses charged in said indictment in this: That on the 8th day of January, 1916, said defendants were tried in the U. S. Commissioner's Court for Cape Nome Precinct, Second Division of the Territory of Alaska for the identical offenses charged in said indictment, by James Frawley, U. S. Commissioner *Ex-officio* Jus-

tice of the Peace, on an information theretofore filed in said Commissioner's court, which information was entitled "United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Chas. Mason, Alfred Pierson, B. Garnard, A. Hanson, N. B. Nelson, defendants."

This motion is based upon the records, proceedings and files of said U. S. Commissioner's Court in said action, and on the affidavit of George B. Grigsby hereunto annexed and made a part hereof.

Dated at Nome, Alaska, this 11th day of April, 1916.

GEORGE B. GRIGSBY,
HUGH O'NEILL,
Attorneys for Defendants.

Affidavit of George B. Grigsby.

United States of America,
Territory of Alaska,
Second Division,—ss.

George B. Grigsby, being duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendants herein. That on the 7th day of January, 1916, an information was filed [147] in the U. S. Commissioner's Court for the Precinct of Cape Nome, Second Division, of the Territory of Alaska, charging the defendants herein with the identical offenses charged, or attempted to be charged, in the indictment herein. That affiant represented the defendants herein in all proceedings in said U. S. Commissioner's Court in relation to said offenses.

That on the 7th day of January, 1916, at the hour of 2 o'clock P. M. of said day, affiant appeared in said U. S. Commissioner's Court as attorney for all of said defendants in said action theretofore commenced by the filing of said information and requested the Court to enter a plea of not guilty for each of said defendants and demanded a jury trial. That thereafter said U. S. Commissioner, James Frawley refused said demand for a jury trial and proceeded to hear the evidence in said action and thereafter failed and refused to find the defendants, or any of them, guilty or not guilty of the offenses charged, or either of them, but did order all of said defendants except Charles A. Mason, A. Hanson and N. B. Nelson to be held to answer to the District Court.

That by reason of the information filed in said Commissioner's Court against said defendants and their appearance personally and by attorney and the laws of Alaska the said James Frawley, United States Commissioner, had jurisdiction of said action and jurisdiction of the person of the defendants and jurisdiction to try said action as *ex-officio* Justice of the Peace.

WHEREFORE affiant alleges that the defendants herein have been in jeopardy by reason of having already been tried for the identical offenses charged, or attempted to be charged, in said indictment, and that the above-entitled court is without jurisdiction.

GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 11th day of April, 1916.

[Seal]

D. B. CHACE,
Notary Public for the Territory of Alaska, Residing
at Nome.

(My commission expires May 12th, 1917.) [148]

III.

The Court erred in sustaining the motion of the United States Attorney for a continuance of this case from April 17th 1916, until April 18th, 1916, as appears by the Bill of Exceptions herein.

IV.

The Court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 18th, 1916, until April 19th, 1916, as appears by the Bill of Exceptions herein as follows:

Thereupon pursuant to adjournment proceedings were resumed at 10 o'clock Tuesday morning, April 18th, 1916.

F. M. Saxton moved the Court that the case be continued until the next day at 10 o'clock A. M. on the ground that the United States was unable to find the witnesses previously referred to.

Whereupon the following proceedings were had:

Mr. O'NEILL.—I think the District Attorney should be compelled to set this case far enough ahead so he can get his witnesses here.

The COURT.—I don't care to hear any argument in this case. As long as there is any possibility of finding these witnesses I am going to continue this case from day to day and that possibility will be determined by the information I get from the District Attorney.

V.

The Court erred in sustaining the motion of the United States Attorney to continue the case from April 19th, 1916, until April 20th, 1916, as appears from the Bill of Exceptions herein.

VI.

The Court erred in sustaining the motion of the U. S. Attorney that the case be continued from April 20th, 1916, until [149] April 21st, 1916, as appears from the Bill of Exceptions herein.

VII.

The Court erred in sustaining the motion of the U. S. Attorney to continue the case from April 21st, 1916, until April 24th, 1916, as appears from the Bill of Exceptions herein.

VIII.

The Court erred in sustaining the motion of the U. S. District Attorney to continue this case from April 24th, 1916, to April 26th, 1916.

IX.

The Court erred in overruling the motion of the defendants herein that a special officer be appointed to serve the special venire issued herein upon the 26th day of April, 1916, which motion and the affidavit in support thereof were as follows:

Motion.

Come now the defendants in the above-entitled cause and move the Court that a special officer be appointed to serve the venire for additional jurors about to issue herein on the ground that the United States Marshal and his deputies are not indifferent

persons and are interested in the event of the above-entitled cause.

This motion is based upon the affidavit of Geo. B. Grigsby hereto attached and made a part hereof.

GEORGE B. GRIGSBY,

HUGH O'NEILL,

Attorneys for Defendants. [150]

Territory of Alaska,
Second Division,—ss.

George B. Grigsby, being first duly sworn, deposes and says:

That the above-entitled action came on for trial on the 12th day of April, 1916, in the above-entitled court and thereafter on the 14th day of April, 1916, resulting in a disagreement of the jury and was immediately set for retrial for the 17th day of April, 1916.

That on said previous trial of said case one N. B. Nelson testified that on the 30th day of December, 1915, he was employed by E. R. Jordan, the United States Marshal for the Second Division, District of Alaska, to look up gambling in the town of Nome; that thereafter, pursuant to said employment the said Nelson on five or six different evenings played "stud poker" for money in a place known as the Arctic Billiard Parlors, the last occasion of said playing being on the 5th day of January, 1916; that on said last mentioned occasion he, the said Nelson, played "stud poker" for money with certain of the defendants above-named and during the progress of the game left the place where the same was being

carried on and reported the existence of the game to Deputy Marshal Phil Holland; that thereupon said Nelson returned to said Arctic Billiard Parlor and shortly thereafter said Phil Holland, together with said Chief Deputy Marshal A. B. Miller and Deputy Marshals Elmer Reed and Joel Terrell entered said place and arrested the defendants herein without warrant; that said E. R. Jordan testified at said, former trial that he did employ the said N. B. Nelson as testified to by the said Nelson and paid him for his said services the sum of sixty-five dollars with money belonging to him personally; that on the trial of said action one Perry Moore testified that shortly before the 25th day of December, 1915, he heard the said Deputy Marshal Phil Holland say to defendant Ed. [151] Johnson, "I am coming after you and I'm going to get you." That said E. R. Jordan and all of his deputy marshals above-named were witnesses against the defendants on said former trial, and with the exception of N. B. Nelson and the said deputy marshals above-named, there was no evidence offered by the Government tending to prove that the defendants, or any of them, played the games of cards mentioned in the indictment herein, nor any evidence whatever that said games were played for money, except the evidence of the said N. B. Nelson.

WHEREFORE affiant alleges that the said United States Marshal E. R. Jordan and his said deputies are not indifferent persons for the summoning of jurors herein as required by Sec. 803, R. S. That said prosecution originated in said marshal's office

without the complaint of any private citizen, and that by reason of the foregoing facts the said United States Marshal E. R. Jordan and his said deputies are unduly interested in the securing of a conviction herein.

GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 17th day of April, 1916.

[Seal]

D. B. CHACE,

Notary Public in and for the Territory of Alaska.

X.

The Court erred in denying and overruling the challenge for cause made by the defendants to the juror W. H. Pearson as follows:

Q. And so if you went into the trial of this case you already have quite a strong opinion as to the guilt or innocence of the defendants? [152]

A. Yes, sir.

Q. Which would remain with you unless evidence was introduced to change it? A. Yes, sir.

Q. And if there was no evidence introduced to change it, it would affect your judgment?

A. If it wasn't changed it certainly would.

Q. So that would necessarily affect your verdict, would it not? A. Yes, sir.

Q. Unless there was some evidence in the case strong enough to change your present opinion your verdict would be affected by your opinion.

A. Yes, sir.

* * * * *

Q. You say, Mr. Pearson, that that opinion would require some evidence to remove?

A. Yes, sir.

Q. And that if no evidence was offered having a tendency to change your present opinion, then your present opinion would affect your verdict?

A. I don't know as I just understand you.

Q. Well you have an opinion now as to the guilt or innocence of the accused? A. Yes, sir.

Q. Which would require evidence to change?

A. Yes, sir.

Q. Now, if no evidence was offered having a tendency to change your present opinion then your present opinion would affect your verdict?

A. Yes, if there was no evidence to change it.

[153]

* * * * * * * *

Q. Now, what do you mean by a fixed opinion, Mr. Pearson? You say that your opinion is a fixed opinion.

A. Well, if there is nothing comes up to change it.

Q. Then you are in a state of mind where you could already render a verdict if nothing came up to change your opinion? A. Yes, sir.

* * * * * * * *

Q. Now, you are sure you have a fixed opinion as to the guilt or innocence of some of the defendants. I will ask you if you were charged with the crime of gambling, if you would be satisfied to be tried by a juror in your present frame of mind as regards this case?

A. Well, no, I don't think I would.

Q. Do you think it would be fair to be tried by jurors in your present frame of mind?

A. No, sir.

Q. Supposing every juror on this panel has your opinion in this case, do you think that these defendants would have a fair trial? A. Well—

Q. Would you call that a fair trial?

A. If they go strictly according to the evidence.

* * * * *

Q. Supposing every juror here had your present fixed opinion relating to the guilt or innocence of these defendants, and you were the defendant, would you be satisfied to be tried by that kind of a jury? A. I would if I could prove I was innocent.

Q. If you could prove you were innocent?

A. Yes, sir.

WHEREUPON counsel for the defendants challenged the said [154] juror upon the ground of actual bias, which said challenge the said court overruled, to which ruling of the Court an exception was then and there allowed.

Whereupon defendants excused the juror Pearson peremptorily.

XI.

The Court erred in overruling and denying the application of defendants to exercise a fourth and additional peremptory after the defendants had exhausted the peremptory challenges allowed by law.

XII.

The Court erred in overruling the objection of the defendants to the following testimony of the witness Phil Holland testifying on behalf of the Government: "They were playing 'pangingui' at the table I was at. Mr. Johnson, Mr. Novosel, Mr.

Koibetitz, Mr. Pierson and Mr. Mason were sitting at the 'pangingui-table.' I will have to examine my memorandum again." (Witness refers to paper.)

Mr. GRIGSBY.—We object to the witness referring to any memorandum.

The COURT.—Overruled.

To which ruling of the Court the defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) "The memorandum I refer to is something made after the persons arrested came to the jail."

XIII.

The Court erred in overruling the objection of the defendants to the admission of certain evidence of the witness Phil Holland, as follows:

"I also took in my possession the checks and chips that were on this 'pangingui-table.' (Package of checks or chips [155] handed to witness.) Yes, these are the checks I got at that time. They were before each of the players at the 'pangingui-table.' There might have been a few out in the center of the table but I am not positive as to that."

Package of checks referred to offered in evidence.

Mr. O'NEILL.—I would like to examine him before these checks are admitted.

Q. (By Mr. O'NEILL.)—Mr. Holland, where did you get those checks?

WITNESS.—(Continuing.) On the table, on the "Pangingui-table." I did not put any specific mark of identification upon any of these checks, nor have them in my exclusive possession from the time I

took them until the present time. I took them and put them in my pocket until we got to the jail and then I put them in that sack and I left them there in the jail and turned them over to the court the next day. I left them with the jailor. I think Mr. McKay was the jailor that night. I left them at the jail. I don't recognize the bag. It was one similar to that and the checks were similar to those.

Q. You could not swear those were the specific checks? A. Checks similar to these here.

Mr. O'NEILL.—We object to the admission of the checks upon the ground that there is no foundation laid, no proper identification.

The COURT.—Objection overruled.

To which ruling the defendants excepted and an exception was allowed.

And thereupon a paper bag of checks containing an assortment of orange and blue pasteboard checks or chips with certain printing thereon was received in evidence, and marked Plaintiff's Exhibit "D."
[156]

XIV.

The Court erred in sustaining the objection made by the Government to the following question propounded to the witness Phil Holland:

Q. Now, after Nelson had made this report about this particular place, did you direct him to look up other places?

Mr. SAXTON.—Objected to as immaterial.

Mr. GRIGSBY.—It shows the interest of the witness and is proper cross-examination.

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception was allowed.

XV.

The Court erred in sustaining the objection of the Government to the following question propounded to the witness Phil Holland:

Q. Did you ever ask him if he had ferreted out any other gambling in Nome?

To which question the Government objected and the Court sustained the objection and an exception was then and there allowed to the defendants.

XVI.

The Court erred in overruling the objection made by the defendants to the following questions propounded to the witness Phil Holland on redirect examination as follows:

Q. When you made the arrest on the night of the 5th of January last, did you afterwards go back and make further search of the premises?

Mr. O'NEILL.—Objected to as incompetent, irrelevant and immaterial, *res inter alios acta*, no part of the *res gestae*, no connection shown and no foundation laid. [157]

The COURT.—Objection overruled.

To which ruling of the Court the defendants excepted and an exception was allowed.

A. I did. I searched the lower floor and I searched the upper floor. I got out a search warrant.

Q. What were you looking for?

Mr. O'NEILL.—Same objection, same grounds.

The COURT.—Overruled.

To which ruling of the Court the defendants excepted and an exception was allowed.

A. Well checks, dice, gambling tools. I found under that search warrant on these premises and took in my possession playing cards and checks and gave a receipt for them.

WITNESS.—(Continuing.) Yes, those checks in that drawer you showed me are the checks I refer to, to the best of my belief. I took them with me and turned everything over to the court on the day of the trial. These are the checks and cards.

(Drawer, checks and cards offered in evidence.)

Mr. O'NEILL.—Objected to on the ground that they are immaterial, not connected with the crime, and calculated to prejudice the jury against the defendants.

The COURT.—Objection overruled.

To which ruling of the Court the defendants excepted and an exception was allowed.

(Drawer containing box of playing-cards and decks of playing-cards, assortment of chips and checks and a coin rack admitted in evidence and marked Plaintiff's Exhibit "C.")

XVII.

The Court erred in ruling out a certain question propounded to the witness Phil Holland on recross-examination, as follows:

Q. What other places did you suspect? [158]

The COURT.—Don't go into that.

Mr. GRIGSBY.—It is to show the prejudice of this witness; if he had a personal prejudice against the defendants I have a right to show it. (Argu-

ment.) If he knew of a dozen other places and he confines his attention to one it shows a personal *animus* against those defendants which I have a right to show to affect his credibility before the jury.

The COURT.—I rule it out.

To which ruling of the Court the defendants excepted and an exception was allowed.

XVIII.

The Court erred in ruling out a certain question propounded by the defendants to the witness Phil Holland on recross-examination as follows:

Q. Mr. Holland, will you explain to the jury your motive after you had arrested these defendants on the information given you by “Black Nels” and after the preliminary examination in which yourself, Mr. Miller and the other deputies testified you caught them playing “pangingui” and “stud poker” and produced checks and cards that they were playing with, what was your motive in going back and getting these tables?

The COURT.—I rule the question out.

To which ruling of the Court the defendants excepted and an exception was allowed.

IX.

The Court erred in refusing to compel the witness E. R. Jordan to answer a certain question propounded to him by the defendants as follows: [159]

Q. How did you employ Nelson and in what respect?

A. I told him to go down and look up any gambling and report to the office. I did that in my official capacity.

Q. Why did you pay him out of your private funds? A. That is my business.

Mr. O'NEILL.—Now, if your Honor please, I am not going to stand for the impudence of this witness.

The COURT.—I don't think the witness is impudent. Take your seat. He has a right to pay his own money if he wants to.

Mr. O'NEILL.—I have a right to know why he paid his own money to show the *animus* of the witness, if any there be.

The COURT.—He has stated because he chose to do so.

Mr. O'NEILL.—He said it was his business. I want to know why he chose to do so.

Defendants excepted to the ruling of the Court in refusing to compel the witness to answer the question, and an exception was allowed.

XX.

The Court erred in overruling the objection made by the defendants to the following testimony of the witness Wm. Dougherty testifying on behalf of the Government, to wit:

“Some time prior to the 5th of January, 1916, the defendant Ed. Johnson, in my presence, made a statement as to his intention with reference to carrying on gambling here in Nome. He said he was going to gamble, he intended to gamble.”

Mr. GRIGSBY.—I didn't notice the question, if your Honor please. I ask leave to have an objection entered on the ground it is too remote, doesn't tend to show whether or not the crime was committed on the 5th of January, as charged in the indictment.

The COURT.—Objection noted and overruled.

To which ruling of the Court the defendants excepted and an exception was allowed.

WITNESS.—(Continuing.) That statement was made somewhere along in October, 1915.

Mr. GRIGSBY.—We move that the answer be stricken out as fixing the time too remote to have any bearing on this case.

The COURT.—Overruled.

To which ruling the defendants excepted and an exception was allowed.

XXI.

The Court erred in overruling the objection made by the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

Q. And what did you report to him?

Mr. GRIGSBY.—Objected to as calling for a conversation not in the presence of the defendants, or any of them.

The COURT.—Overruled.

To which ruling of the Court the defendants excepted and an exception was allowed.

A. I reported that there was gambling down at the Arctic Billiard Hall and he could get them and then I went back and got into the game again.

XXII.

The Court erred in overruling the objection of the defendants to the following question propounded to the witness, N. B. Nelson, testifying on behalf of the Government:

Q. Now, with reference as to who was present at

your table, I will ask you if this gentleman sitting behind me was at [161] your table. (Counsel turns and points to one of the defendants.)

Mr. GRIGSBY.—Objected to as leading, if the Court please.

The COURT.—Overrule the objection.

To which ruling of the Court the defendants excepted and an exception was allowed.

A. He was.

XXIII.

The Court erred in overruling the objection made by the defendants to the following question propounded the witness N. B. Nelson testifying on behalf of the Government:

Q. Had you ever been up there before and seen them gambling?

Mr. GRIGSBY.—Objected to as calling for proof of another offense, and prejudicial.

The COURT.—Overrule the objection.

To which ruling of the Court the defendants excepted and an exception was allowed.

A. I had seen them gambling pretty near every night for a week, playing “stud poker” and “pang-ingui.”

XXIV.

The Court erred in overruling the objection of the defendants to the following question propounded the witness N. B. Nelson testifying on behalf of the Government:

Q. From whom did you buy chips at those previous games?

Mr. GRIGSBY.—Objected to as being proof of

another offense not connected with the crime charged in the indictment.

The COURT.—Overruled.

To which ruling of the Court the defendants excepted and an exception was allowed. [162]

A. Whoever might be running the game.

XXV.

The Court erred in overruling the objection made by the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

Q. Did you buy any from Mr. Johnson?

Mr. GRIGSBY.—Objected to as leading.

The COURT.—Overrule the objection.

To which ruling of the Court the defendants excepted and an exception was allowed.

A. I think I did.

XXVI.

The Court erred in sustaining the objection made by the Government to the following question propounded by the defendants to the witness N. B. Nelson on cross-examination:

Q. Have you ever done what is called “stool-pigeoning” before?

Mr. SAXTON.—Object to that.

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception was allowed.

XXVII.

The Court erred in sustaining the objection made by the Government to the following question propounded by the defendants to the witness N. B. Nel-

son on cross-examination :

Q. Have you ever done any "gum-shoeing?"

Mr. SAXTON.—We object to the "gum-shoeing."

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception was allowed. [163]

XXVIII.

The Court erred in refusing to permit the defendants to ask certain questions of the witness N. B. Nelson on cross-examination as follows :

Q. Have you ever acted as an informer before?

A. I don't really know the meaning of your term.

Q. Do you understand what the term "stool-pigeon" means? A. Yes, sir.

Mr. GRIGSBY.—I will ask permission to use the language the witness understands, if the Court please.

The COURT.—Overrule the permission.

To which ruling of the Court the defendants excepted and an exception was allowed.

XXIX.

The Court erred in sustaining the objection made by the Government to the following question propounded by the defendants to the witness N. B. Nelson on cross-examination :

Q. Didn't you testify in your former examination on the former trial of this case that all he told you to do was to look up gambling in the town of Nome and report to Phil Holland?

Mr. SAXTON.—We object to this. This is reduced to writing and signed by the witness and it is improper to ask this witness what he testified to on

the former examination without exhibiting to him the writing.

And thereupon after argument the Court refused to permit counsel to ask the above question without first exhibiting to the witness a paper purporting to be the written transcript of his testimony, to which ruling of the Court the defendants then and there excepted and an exception was allowed. [164]

XXX.

The Court erred in refusing to permit the defendants to ask the witness N. B. Nelson the following question on his cross-examination without first exhibiting to him a paper purporting to be a transcript of his testimony at the former trial, as follows:

Q. (By Mr. GRIGSBY.) Now did you at that former trial make the following answer to the following question? (Using transcript of testimony furnished by Mr. Saxton.) "Q. Who else was sitting at the table you were sitting at?

A. Mr. Laird and myself, Mr. Adams and that man they call the tamale man, Mr. Pierson, and I think the fellow we call 'Rube' Johnson, but I am not certain about him." Did you make that answer?

Mr. SAXTON.—We ask that this writing be exhibited to the witness.

The COURT.—Show it to him Mr. Grigsby.

Mr. GRIGSBY.—We object to such procedure.

The COURT.—Overruled.

To which ruling of the Court the defendants excepted and an exception was allowed.

(Mr. Grigsby shows transcript to witness.)

Q. Did you make that answer? A. I did.

XXXI.

The Court erred in refusing to permit defendants to propound the following questions to the witness N. B. Nelson on cross-examination without his showing him the paper purporting to be a transcript of his testimony at the former trial of this case:

Q. Did you on the former trial of this case testify as follows: (Referring to the stud poker-table.) "Q. Was Nick Skorlich at that table? A. I could not positively state, I am not sure, I think he was." Did you so answer, did [165] you so state? Can you answer that without looking at this paper?

A. I can.

Mr. SAXTON.—I object unless the paper is shown to the witness and he can see what his answer was and what the question was.

The COURT.—Show him the paper, Mr. Grigsby.

To which ruling of the Court the defendants excepted and an exception was allowed.

Q. (Mr. Grigsby continuing after showing witness transcript.) Did you so answer?

A. Yes, sir.

Q. And you answered a minute ago he was not?

A. I don't think he was. I don't know what has happened to change my recollection of it since the former trial.

XXXII.

The Court erred in sustaining the objection made by the Government to the following question propounded by the defendants to the witness J. H. Young on cross-examination:

Q. Don't you know that one of the deputies in-

formed Mr. Saxton to that effect?

Mr. SAXTON.—Objected to as incompetent and immaterial and not cross-examination.

The COURT.—Sustain the objection.

To which ruling of the Court the defendants excepted and an exception was allowed.

XXXIII.

The Court erred in admitting in evidence a certain stipulation offered by the Government as follows: [166]

*In the District Court for the District of Alaska,
Second Division.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOI-
BETITZ, JOHN NOVOSEL, NICK SKOR-
LICH, ALFRED PIERSON, ADELBERT
G. GUMAER,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys as follows:

1. That after diligent effort the United States is not able to produce, at the trial of this cause, the following witnesses, to wit, A. Hanson and Elmer Adams.

2. That each of said witnesses, if produced as a witness on the trial of this cause, would refuse to testify to any of the material facts in this cause upon

the ground that such evidence would tend to incriminate himself.

3. That this stipulation may be considered in evidence and read to the jury upon the trial of this cause.

F. M. SAXTON,
United States Attorney.

G. B. GRIGSBY,
HUGH O'NEILL,

Attorneys for Defendants. [167]

To which offer defendants objected upon the ground the said stipulation was immaterial, which objection was overruled by the Court and an exception allowed defendants to said ruling.

XXXIV.

The Court erred in sustaining the motion made by the Government to strike out certain testimony and in sustaining the objection made by the Government to said testimony of the witness Merrill Beatty, a witness testifying on behalf of the defendants as follows:

Q. I will ask you to state whether or not in that conversation between you and him in the presence of Ed Young the proprietor of the Nevada, and Nick Barge, and other persons being present, he stated to you that he has acted as a "stool-pigeon" before?

A. He did.

Q. And got paid for it? A. Yes, sir.

Mr. SAXTON.—I move to strike out the answer of the witness and object to the question for the reason it is entirely immaterial.

The COURT.—Motion granted and objection sus-

tained. To which ruling of the Court the defendants excepted and an exception was allowed.

XXXV.

The Court erred in refusing to permit defendants to prove the conversation referred to in the last assignment of error by the witness Ed Young and the witness Nick Barge, as follows:

Mr. GRIGSBY.—We offer to prove the same conversation by Ed Young and Nick Barge.

Mr. SAXTON.—Same objection.

The COURT.—Objection sustained. [168]

To which ruling of the Court the defendants excepted and an exception was allowed.

XXXVI.

The Court erred in refusing to grant the motion made by the defendants that the Court direct a verdict of “not guilty” as to each of the defendants for the crimes charged in the indictment, and both of them, for the reason that there is no evidence of any gambling for money except that of the witness N. B. Nelson, who is a self-confessed accomplice, the statute of Alaska providing that a conviction cannot be had upon the uncorroborated testimony of an accomplice. To which ruling of the Court the defendants excepted and an exception was allowed.

XXXVII.

The Court erred in refusing to permit the defendants to put in evidence the transcript of the proceedings of the United States Commissioner’s Court for the Nome Precinct, Second Division, Territory of Alaska, in the case of the United States of America versus Ed Johnson, A. C. Laird and others, for the

purpose of showing that the defendants, and each of them, had already been tried for the precise offense charged in the indictment. The Government objected to this offer as incompetent, irrelevant and immaterial, which objection was sustained by the Court, and an exception allowed the defendants to said ruling. Said transcript was marked "Defendants' Exhibit 1" for identification and is contained in the Bill of Exceptions herein.

XXXVIII.

The Court erred in refusing to permit the defendants to prove certain facts by the witness Mr. Saxton, the U. S. District Attorney, as follows:

Mr. GRIGSBY.—I now offer to prove by Mr. Saxton, [169] the District Attorney, the proceedings which took place at the preliminary hearing and to show by him that the defendants have already had a trial for the precise crimes charged in the indictment, the witness Saxton being present in court.

Mr. SAXTON.—Same objection.

The COURT.—Objection sustained.

To which ruling of the Court the defendants excepted and an exception was allowed.

XXXIX.

The Court erred in sustaining the objection made by the Government to the following question propounded the witness John Nestor on redirect examination:

Q. Isn't it a fact that when Nelson was first examined he said there was something about the game he did not like, and for that reason he complained, and didn't Mr. Saxton then take him in hand and say:

"You were hired by the Marshal to go down there"?

Mr. SAXTON.—Object to that. It is entirely immaterial. This is an impeaching witness.

The COURT.—Sustained the objection.

To which ruling of the Court the defendants excepted and an exception was allowed.

XXXX.

The Court erred in permitting the U. S. Attorney, F. M. Saxton, in his address to the jury, to comment as follows:

"Gentlemen of the Jury, the witness Charles Mason, one of the men who was arrested together with the defendants in this action, has been sworn as a witness in this case, and when asked with reference to what was going on in the Arctic Billiard Parlor at the time of the arrest, in his presence, refused to answer on the ground that said answer might tend to criminate [170] him. Gentlemen of the jury, what was going on there at that time that he was unwilling to tell about for fear it might incriminate him? You know perfectly well what was going on. There was a crime being committed there and you know perfectly well what crime it was."

Whereupon George B. Grigsby excepted to the remarks as being prejudicial to the defendants and asked the Court to instruct the jury that such comment was improper and to disregard the same, which the Court then and there refused to do. To which ruling of the Court the defendants excepted and an exception was allowed.

XXXXI.

The Court erred in giving the jury the following

instruction, being a portion of Instruction No. 4, as follows:

“It is the duty of the Judge of this court to instruct you upon the law applicable to the case, and the statute makes it your duty to accept as law what is laid down by the Court as such in these instructions, and if you should knowingly refuse to do so you would be liable as for contempt of court.”

To which instruction an exception was taken by the defendants and allowed by the Court.

XXXXII.

The Court erred in giving the following instruction to the jury, being instruction No. 51½:

“I instruct you that the testimony of one witness, if believed by you, is sufficient to establish any material fact in the case unless such witness is an accomplice. If you believe from the evidence that the witness N. B. Nelson was employed by the United States Marshal for this division to engage in the apprehension of persons violating the law by gambling, and that in pursuance of said employment the said Nelson engaged in a gambling game, if any, with the defendants, then I instruct [171] you that said Nelson is not an accomplice with the defendants, and you should give his testimony the same weight and consideration as you would have done if he had been present and had testified to the same matters without participating in the game.

On the other hand, if you believe from the evidence that the said witness N. B. Nelson was not employed by the United States Marshal or that he did not engage in the gambling game, if any, with the defend-

ants for the purpose of apprehending them, then I instruct you that he was an accomplice and his testimony connecting the defendants with the game, if any, must be corroborated by some other evidence which tends to connect the defendants with the game. However, his testimony as to the character and elements of the game need not be corroborated even though he be an accomplice. In other words the testimony of an accomplice is sufficient, if you believe it, to establish that a certain game played with cards for money, checks, chips or credits of value was being played at a certain time and place, without any corroboration whatever. But his testimony as to who was engaged in or connected with the game, if any, must be corroborated by some other evidence tending to connect the defendants with the game.

Hence, the testimony of said witness, N. B. Nelson, whether you find that he was an accomplice or not, if you believe it, is sufficient to establish the kind of a game that was being played, if any; the means or instrumentalities used in playing such game, if any; and the nature and value of the 'stakes' for which such game was being played, if any. However his testimony, if any, connecting the defendants with the game, must be corroborated as heretofore stated, in case you find him to be an accomplice, but not otherwise."

To which instruction an exception was taken by the defendants and allowed by the Court. [172]

XXXXIII.

The Court erred in instructing the jury as follows, being Instruction No. 51½A.

“The Government has introduced certain evidence in this case tending to show that the defendants were playing for certain chips on which the value in trade of each chip is printed. I instruct you that the printing on each of such chips is sufficient evidence to establish the value thereof, since no evidence has been introduced to explain or contradict the printing thereon.”

To which instruction an exception was taken by the defendants and allowed by the Court.

XXXXIV.

The Court erred in instructing the jury as follows, being Instruction No. 7:

“The owner or lessee of a building or room cannot lease or sublet such building or room for an unlawful purpose, or knowingly permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts transpiring in such building or room. If you should find from the evidence in this case that one of the defendants held the room in which gambling is alleged to have been conducted under a lease from the owner, and you further find that gambling as alleged was being conducted there, then I instruct you that such owner or lessee is guilty if he knew that such gambling was being carried on there whether he had any connection with the game or not.

It follows, therefore, that if you find gambling was being carried on in the room known as the Arctic Billiard-room or Parlor, and that said room was being held by defendant under a lease from the owner, either oral or written, then I instruct you that

such defendant is guilty if he knew that [173] such room was being used for the purpose of gambling, and a game of stud poker or pangingi played with cards for money or chips of value was had in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist.

Again if you find that a game of stud poker or pangingui was played with cards for money or chips of value on the night in question, in said room, and the defendant had anything to do with said game such as dealer, player, owner, proprietor or employee, then I instruct you that the defendant is guilty, and it does not matter whether he was the lessee or owner of said room and had previous knowledge of said game or not."

To which instruction an exception was taken by the defendants and allowed by the Court.

XXXXV.

The Court erred in instructing the jury as follows, being Instruction No. 8:

"I have permitted evidence to be introduced in this case tending to show gambling to have been carried on in the room known as the Arctic Billiard-room at other times prior to the time alleged, for the purpose of establishing the knowledge of the owner and lessee of said room that gambling was being carried on there, and you should consider it for no other purpose. As to what extent such testimony tends to show such knowledge on the part of defendant is for you to determine."

To which instruction an exception was taken by

the defendants and allowed by the Court.

XXXXVI.

The Court erred in instructing the jury as follows, being Instruction No. 9:

“There has been some testimony tending to show that the [174] defendant Ed Johnson has made statements to the effect that he intended to gamble in spite of law and the efforts of officials to stop him. You should consider his testimony only in determining the guilt or innocence of said defendant, Ed Johnson. You should not consider it as affecting the guilt or innocence of the other defendants.”

To which instruction an exception was taken by the defendants and allowed by the Court.

XXXXVII.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendants with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.”

To the refusal of the Court to give such instruction the defendants excepted, and an exception was allowed.

XXXXVIII.

The Court erred in refusing to give the following instruction requested by the defendants:

“You are instructed that if you believe from the evidence in this case the witness N. B. Nelson to have

been an accomplice of the defendants, or any of them, with relation to the crime or crimes charged in the indictment, then you are instructed that unless the evidence of the witness N. B. Nelson with relation to the crime charged be corroborated by other evidence tending to show that the defendants, or some of them, actually played cards for money, then you should acquit.

It is not sufficient, in case you find N. B. Nelson to have been an accomplice, that his evidence be corroborated with respect [175] to matters which do not necessarily involve the guilt of the accused. He must be corroborated in matters which bear directly upon the guilt of the accused of the offense of gambling."

To the refusal of the Court to give such instruction the defendants excepted, and an exception was allowed.

XXXXIX.

The Court erred in refusing to give the following instruction requested by the defendants:

"The indictment in this case charges the defendants with having played certain games of cards for money at the time and place charged in the indictment. If you are satisfied from the evidence that the defendants, or any of them, did actually play the game of cards mentioned in the indictment at the time and place charged, then it will be for you to determine whether or not such game or games were played for money or representative of value, and in determining this necessary element of the crime charged, you are instructed that a conviction cannot

be had upon the uncorroborated testimony of an accomplice, and if you should find from the evidence that the witness N. B. Nelson was an accomplice and there is no other testimony in the case than his tending to prove that gambling actually took place, then it will be your duty to acquit the defendants."

To the refusal of the Court to give such instruction the defendants excepted, and an exception was allowed.

L.

The Court erred in refusing to give the following instruction requested by the defendants:

"You are instructed that the testimony of an accomplice should be viewed with distrust."

To the refusal of the Court to give such instruction the defendants [176] excepted, and an exception was allowed.

LI.

The Court erred in refusing to give the following instruction requested by the defendants:

"Evidence has been introduced in this case tending to show that one Charles Mason was present in company with the defendants at the time of the arrest of the defendants for the crimes charged in the indictment. The said Charles Mason was called as a witness for the Government in this case and refused to answer certain material questions propounded to him, basing his refusal on the ground that his answer to the questions might tend to criminate him.

You are instructed that you are not to draw any inference prejudicial to the defendants in this case on account of said refusal on the part of said Mason

to answer such questions, and such refusal should in no way be considered by you in determining the guilt or innocence of the defendants, or any of them."

To the refusal of the Court to give such instruction the defendants excepted, and an exception was allowed.

LII.

The Court erred in refusing to give the following instruction requested by the defendants:

"You are instructed with reference to a certain stipulation introduced in evidence in this case and marked Plaintiff's Exhibit 'H,' which stipulation is to the effect that certain witnesses, if present, would refuse to answer any material questions propounded to them, basing their refusal on the ground that their answers to such questions might tend to criminate them, that such stipulation has no [177] probative force whatever and should not be considered by you at all in determining the guilt or innocence of the defendants, and that if the witnesses mentioned in said stipulation had been present in court and refused to answer on the grounds mentioned, such refusal would in no way tend to prove the guilt of the defendants."

To the refusal of the Court to give such instruction and defendants excepted and an exception was allowed.

LIII.

The Court erred in refusing to give the following instruction requested by the defendants:

"You are instructed that the defendants are presumed to be innocent until their guilt is established

to a moral certainty and beyond a reasonable doubt. They are clothed with this presumption, not only at the outset but during all stages of the trial and until the jury determines otherwise."

To the refusal of the Court to give such instruction the defendants excepted and an exception was allowed.

LIV.

The Court erred in refusing to give the following instruction requested by the defendants:

"The evidence in this case shows that E. R. Jordan paid the witness N. B. Nelson a sum of money out of his own personal funds to investigate gambling conditions in the town of Nome. You are instructed that no private person can hire another to participate in a criminal offense even though such participation be for the purpose of detecting other guilty persons and relieve such participant from criminal responsibility, therefore if you believe from the evidence that E. R. Jordan hired the witness Nelson and paid him out of his own personal funds and that the said Nelson participated in the game [178] pursuant to said employment, the said Nelson would be and is an accomplice of all engaged in said game."

To the refusal of the Court to give such instruction the defendants excepted and an exception was allowed.

LV.

The Court erred in instructing the jury after they had retired to deliberate upon their verdict and had been recalled into court, as follows:

"Gentlemen of the Jury: Upon the evidence and

instructions in this case you should be able to reach a verdict.

The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.

Now, I shall give you a longer time for a further and more serious consideration of this case. When you retire to the jury-room again, read over the instructions of the Court carefully and if there is anything about them you do not understand, so advise the Court and I will endeavor to make the same plain to you. It is your duty to arrive at a verdict in the case according to the evidence and the instructions given you, irrespective of all other considerations.”

To which instruction the defendants then and there excepted on the ground that said instruction was an attempt to influence the jury to return a verdict against their consciences, the jury then having been deliberating for more than forty hours.

LVI.

The Court erred in rendering and entering a judgment against the defendants upon the verdict, to which ruling of the [179] Court defendants duly excepted and an exception was allowed.

WHEREFORE the defendants Ed Johnson and A. C. Laird, plaintiffs in error, pray that the judgment of the District Court for the District of Alaska, Second Division, be reversed and set aside.

GEORGE B. GRIGSBY,

HUGH O'NEILL,

Attorneys for Ed Johnson and A. C. Laird, Defendants in the District Court and Plaintiffs in Error.

Service of the within and foregoing assignment of errors admitted this 5th day of August, 1916.

F. M. SAXTON,
U. S. Attorney.

[Endorsed]: 1036—Crim. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird et al., Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy.
[180]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON and ADELBERT G. GUMAER,

Defendants.

Petition for Writ of Error.

Ed Johnson and A. C. Laird, defendants in the above-entitled action, feeling themselves aggrieved by the verdict of the jury and the judgment entered on the 5th day of May, 1916, in said action, come now by George B. Grigsby and Hugh O'Neill, their attorneys, and petition the above court for an order

allowing said defendants to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of bond which the defendants shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in the above-entitled court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

GEORGE B. GRIGSBY,

HUGH O'NEILL,

Attorneys for Defendants.

[Endorsed]: 1036--Crim. In the District Court for the District of Alaska, Second Div. United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Nick Skorlich, Alfred Pierson and Adelbert G. Gumaer, Defendants. Petition for Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. [181]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ,
JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON and
ADEL-BERT G. GUMAER,

Defendants.

Order Allowing Writ of Error.

Upon motion of George B. Grigsby and Hugh O'Neill, attorneys for defendants Ed. Johnson and A. C. Laird in the above-entitled action, and upon filing a petition for a writ of error together with assignment of errors it is hereby

ORDERED that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein and that each of said defendants furnish a bond on said writ of error in the sum of one thousand (\$1,000) dollars, the same to operate as a supersedeas bond.

Dated at Nome, Alaska, this 5th day of August, 1916.

J. R. TUCKER,
District Judge.

[Endorsed]: In the District Court for the District of Alaska, Second Div. United States of America,

Plaintiff, vs. Ed. Johnson, A. C. Laird et al., Defendants. Order Allowing Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. [182]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSSEL, NICK SKORLICH, ALFRED PIERSON and ADELBERT G. GUMAER,

Defendants.

Bond on Writ of Error and Supersedeas.

KNOW ALL MEN BY THESE PRESENTS: That we, A. C. Laird, as principal, and Henry Burgh and George Hall as sureties, are held and firmly bound unto the United States of America, plaintiff above named, in the sum of one thousand (\$1,000) dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 5th day of August, 1916.

The condition of this obligation is such, that,

WHEREAS the above-named A. C. Laird, defendant, has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment in the above-entitled cause rendered by the District Court for the District of Alaska, Second Division;

NOW, THEREFORE, if the above-named A. C. Laird shall prosecute said writ to effect and answer all costs and damages if he should fail to make good his plea, and in that event shall also render himself amenable and in all respects abide and perform the orders and judgments of the above-entitled court and of said appellate court, and render himself in execution in case the said judgment is not reversed, then this obligation shall be void; [183] otherwise to remain in full force and virtue.

HENRY BURGH.

G. A. HALL.

A. C. LAIRD.

United States of America,
Territory of Alaska,
Second Division,—ss.

Henry Burgh and G. A. Hall, being duly sworn, each for himself and not one for the other, deposes and says:

That he is a resident of Nome, in the Territory of Alaska, and one of the sureties above named; that he is not a counselor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court; that he is worth the sum of one thousand (\$1,000) dollars over and above all just

debts and liabilities and exclusive of property exempt from execution.

HENRY BURGH.

G. A. HALL.

Subscribed and sworn to before me this 5th day of August, 1916.

[Notarial Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires May 12th, 1917.)

The foregoing bond approved this 5th day of August, 1916.

J. R. TUCKER,

District Judge.

[Endorsed]: 1036-Crim. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird et al., Defendants. Bond on Writ of Error and Supersedeas. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 5, 1916, G. A. Adams, Clerk. By W. C. McG., Deputy. [184]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON and ADELBERT G. GUMAER,

Defendants.

Bond on Writ of Error and Supersedeas.

KNOW ALL MEN BY THESE PRESENTS: That we, Ed. Johnson as principal, and J. W. Clark and Milo Sladovitch, as sureties, are held and firmly bound unto the United States of America, plaintiff above named, in the sum of one thousand (\$1,000) dollars, to be paid to the United States of America to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 5th day of August, 1916.

The condition of this obligation is such, that,

WHEREAS, the above-named Ed. Johnson, defendant, has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment in the above-entitled

cause rendered by the District Court for the District of Alaska, Second Division;

NOW, THEREFORE, if the above-named Ed. Johnson shall prosecute said writ to effect and answer all costs and damages if he should fail to make good his plea and in that event shall also render himself amenable and in all respects abide and perform the orders and judgments of the above-entitled court and of said appellate court, and render himself in execution in case the said judgment is not reversed, then this obligation shall be void; otherwise to remain in full force and virtue.

J. W. CLARK.

MILO SLADOVICH.

E. M. JOHNSON. [185]

United States of America,
Territory of Alaska,
Second Division,—ss.

J. W. Clark and Milo Sladovich, being duly sworn, each for himself and not one for the other, deposes and says:

That he is a resident of Nome, in the Territory of Alaska, and one of the sureties above named; that he is not a counselor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other office of any court; that he is worth the sum of one thousand (\$1,000) dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

J. W. CLARK.

MILO SLADOVICH.

Subscribed and sworn to before me this 5th day of August, 1916.

[Notarial Seal] D. B. CHACE,
Notary Public for the Territory of Alaska, Residing
at Nome.

(My Commission expires May 12th, 1917.)

The foregoing bond approved this 5th day of August, 1916.

J. R. TUCKER,
District Judge.

[Endorsed]: #1036—Crim. In the District Court for the District of Alaska, Second Division. United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird et al., Defendants. Bond on Writ of Error and Supersedeas. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. [186]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBET-
TITZ, JOHN NOVOSEL, NICK SKOR-
LICH, ALFRED PIERSON and ADEL-
BERT G. GUMAER,

Defendants.

Writ of Error—(Lodged Copy).

The President of the United States of America to
the Honorable, the Judge of the District Court
for the District of Alaska, Second Division,
GREETING:

Because in the record and proceedings as also in
the rendition of the judgment of a plea which is in
the said District Court for the District of Alaska,
Second Division, before you, the United States of
America, plaintiff, and Ed. Johnson and A. C. Laird,
defendants, a manifest error hath happened to the
great damage of said Ed. Johnson and A. C. Laird,
defendants, as appears by the petition herein.

We, being willing that error, if any hath been,
should be duly corrected and full and speedy justice
be done to the parties aforesaid in this behalf do
command you, if judgment be given therein, that
then under your seal distinctly and openly you sent
the record and proceedings aforesaid with all things
concerning the same to the Justices of the United
States Circuit Court of Appeals for the Ninth Cir-
cuit in the city of San Francisco, in the State of
California, together with this writ so as to have the
same at the said place in court on the 4th day of
August, 1916, that the record and proceedings afore-
said being inspected the said Circuit Court of Ap-
peals may cause further to be done therein to correct
those errors what of right and according to the laws
and customs of the United States should be done.

WITNESS the Honorable EDWARD D.
WHITE, Chief Justice of the Supreme Court of the

United States this 5th day of August, 1916. [187]

Attest my hand and seal of the District Court for the Second Division of the District of Alaska, on the day and year last above written.

[Seal]

G. A. ADAMS,

Clerk of the District Court for the District of Alaska, Second Division.

Allowed this 5th day of August, 1916.

J. R. TUCKER,

District Judge.

[Endorsed]: 1036—Crim. In the District Court for the District of Alaska, Second Div., United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird et al., Defendants. Writ of Error. (Lodged Copy.) Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. [188]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON and ADELBERT G. GUMAER,

Defendants.

Order Extending Time to File Record Until October 4, 1916.

On motion of George B. Grigsby and Hugh O'Neill, counsel for defendants, the time for filing the record in the above-entitled cause, in the United States Circuit Court of Appeals for the Ninth Circuit, is hereby extended to and until the 4th day of October, 1916.

Done in open court this 5th day of August, 1916.

J. R. TUCKER,
District Judge.

[Endorsed]: 1036—Crim. In the District Court for the District of Alaska, Second Div., United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird et al., Defendants. Order Fixing Time to File Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. [189]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, ALFRED PIERSON and ADELBERT G. GUMAER,
Defendants.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make transcript of the following papers on file herein:

Indictment, motion to quash indictment and affidavit in support thereof, minute order overruling motion to quash indictment, demurrers, minute orders overruling demurrers, court minutes showing plea former acquittal, written plea former jeopardy, motion that special officer be appointed to serve venire for jurors and affidavit in support thereof, minute order overruling same, instructions of the Court, additional instructions, verdict, judgment bill of exceptions, orders extending time to file bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, bonds on writ of error, lodged copy of writ of error, order extending time to docket case, original writ of error and citation to be attached.

GEORGE B. GRIGSBY.

HUGH O'NEILL.

[Endorsed]: #1036-C. In the District Court for the District of Alaska, Second Div., United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, Frank Koibetitz, John Novosel, Alfred Pierson and Adelbert G. Gumaer, Defendants. Praeipie for Transcript of Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 11, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. [190]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBE-
TITZ, JOHN NOVOSEL, NICK SKOR-
LICH, ALFRED PIERSON, ADELBERT
G. GUMAER,

Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, G. A. Adams, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 190, both inclusive, are a true and exact transcript of the indictment, motion to quash indictment and affidavit in support thereof, minute order overruling motion to quash indictment, demurrer, minute order overruling demurrer, court minutes showing plea former acquittal, written plea former jeopardy, motion that special officer be appointed to serve venire for jurors and affidavit in support thereof, minute order overruling same, instructions of the Court, additional instructions, verdict, judgment, bill of exceptions, orders extending time to file bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, bonds on writ of error, lodged copy of writ of error, order extending time to docket

case and praecipe for Transcript of Record, in the case of United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, Frank Koibetitz, Nick Skorlich, John Novosel, Alfred Pierson and Adelbert G. Gumaer, Defendants, No. 1036—Crim., this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Writ of Error and original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript, \$80.75, paid by George B. Grigsby, of attorneys for defendants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 11th day of September, A. D. 1916.

[Seal]

G. A. ADAMS,
Clerk. [191]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ,
JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT
G. GUMAER,

Defendants.

Writ of Error (Original).

The President of the United States of America to the
Honorable, the Judge of the District Court for
the District of Alaska, Second Division,
GREETING:

Because in the record and proceedings as also in
the rendition of the judgment of a plea which is in
the said District Court for the District of Alaska,
Second Division, before you, the United States of
America, plaintiff, and Ed Johnson and A. C. Laird,
defendants, a manifest error hath happened to the
great damage of said Ed. Johnson and A. C. Laird,
defendants, as appears by the petition herein.

We, being willing that error, if any hath been,
should be duly corrected and full and speedy justice
be done to the parties aforesaid in this behalf, do
command you, if judgment be given therein, that
then under your seal, distinctly and openly, you sent
the record and proceedings aforesaid with all things
concerning the same to the Justices of the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, in the city of San Francisco, in the State of
California, together with this writ so as to have
the same at the said place in court on the 4th day of
September, 1916, that the record and proceedings
aforesaid being inspected the said Circuit Court of
Appeals may cause further to be done therein to cor-
rect those errors what of right and according to the
laws and customs of the United States should be
done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of [192] the Supreme Court of the United States, this 5th day of August, 1916.

Attest my hand and seal of the District Court for the Second Division of the District of Alaska, on the day and year last above written.

[Seal] G. A. ADAMS,
Clerk of the District Court for the District of Alaska,
Second Division.

Allowed this 5th day of August, 1916.

J. R. TUCKER,
District Judge. [193]

[Endorsed]: In the District Court for the District of Alaska, Second Div. United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, et al., Defendants. Writ of Error (Original). [194]

*In the District Court for the District of Alaska,
Second Division.*

No. 1036—C.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED. JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT G. GUMAER,

Defendants.

Citation on Writ of Error.

The President of the United States of America to the
United States of America and F. M. Saxton,
U. S. Attorney for the District of Alaska,
Second Division:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Appeals
for the Ninth Circuit to be held at the city of San
Francisco, in the State of California, on the 4th day
of September, 1916, pursuant to a writ of error filed
in the clerk's office of the District Court for the Dis-
trict of Alaska, Second Division, wherein Ed. John-
son and A. C. Laird are plaintiffs in error, and the
United States of America is defendant in error, to
show cause, if any there be, why judgment in the said
writ of error mentioned should not be corrected and
speedy justice should not be done in that behalf.

WITNESS, the Honorable EDWARD D.
WHITE, Chief Justice of the United States Su-
preme Court of the United States of America, this
5th day of August, 1916, and of the Independence of
the United States the one hundredth and fortieth.

J. R. TUCKER,
Judge of the District Court, District of Alaska, 2d
Division.

[Seal]

Attest: G. A. ADAMS,

Clerk of the District Court. [195]

Service of the foregoing citation hereby admitted
this 5th day of August, 1916.

F. M. SAXTON, [196]

[Endorsed]: In the District Court for the District of Alaska, 2d Division. United States of America, Plaintiff, vs. Ed. Johnson, A. C. Laird, et al., Defendants. Citation (Original).

[Endorsed]: No. 2891. United States Circuit Court of Appeals for the Ninth Circuit. Ed. Johnson and A. C. Laird, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Second Division.

Received September 29, 1916.

F. D. MONCKTON,

Clerk.

Filed Pursuant to Order Entered December 4, 1916, *non pro tunc* as of October 4, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

ED. JOHNSON and A. C. LAIRD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Motion to File Record and Docket Cause as of
October 4, 1916.**

Come now the plaintiffs in error in the above-entitled cause by their attorneys George B. Grigsby and Thos. R. White, and move the Court for an Order directing that the record in the above-entitled cause may be filed and the case docketed as of the date October 4th, 1916.

This motion is based upon the affidavit of George B. Grigsby hereunto annexed and made a part hereof.

GEORGE B. GRIGSBY,
THOS. R. WHITE,
Attorneys for Plaintiffs in Error.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

ED. JOHNSON and A. C. LAIRD,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Affidavit of George B. Grigsby in Support of Motion
to File Record and Docket Cause.**

State of California,
City and County of San Francisco,—ss.

George B. Grigsby, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiffs in error in the above-entitled cause; that judgment was rendered against said plaintiffs in error

in the United States District Court for the Territory of Alaska, Second Division, on the 5th day of May, 1916; that thereafter plaintiffs in error sued out a writ of error to the above-entitled court, which said writ of error was allowed by the said District Court of Alaska on August 5th, 1916; that said District Court of Alaska, by proper order, further extended the time for filing the record in said cause and docketing said cause in the Circuit Court of Appeals, Ninth Circuit, until and including October 4, 1916. That affiant was attorney for plaintiffs in error in all proceedings connected with the suing out of said writ, but that affiant left the second Division of Alaska on or about August 19th, 1916, to take part in the campaign preceding the election of November 7, 1916, affiant being the Democratic candidate for the office of Attorney General of Alaska; that affiant was of necessity absent from Nome, Alaska, in the Second Division of Alaska, for said reason from August 19th until November 5th. That before leaving Nome, Alaska, affiant instructed plaintiffs in error to pay the clerk of the United States District Court of said Second Division, Territory of Alaska, for the transcript herein and to cause the same to be mailed to the clerk of the Circuit Court of Appeals, and to remit to said Clerk of the Circuit Court of Appeals the sum of twenty-five dollars, being the fee for filing the record and docketing the case. That accordingly plaintiffs in error did cause said transcript of record to be forwarded as aforesaid to the clerk of this court, but inadvertently failed to remit the said docket fee required by law. That said transcript of

record was received by the clerk of this court on September 29th, 1916, but that the clerk of said court did not receive said docket fee on or prior to October 4th, 1916.

That for the above reasons said cause has not been *docket* nor said record filed.

That no motion has been made by any one appearing on behalf of the United States, that said case be dismissed.

GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 29th day of November, 1916.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: No. 2891. In the United States Circuit Court of Appeals, for the Ninth Circuit. Ed. Johnson and A. C. Laird, Plaintiffs in Error, vs. United States of America, Defendant in Error. Motion to File Record and Docket Case and Affidavit of George B. Grigsby. Filed Dec. 4, 1916. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fourth day of December, in the year of our Lord one thousand, nine hundred and sixteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge:

No. 2891.

ED JOHNSON et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order Directing Filing of Record and Docketing of Cause.

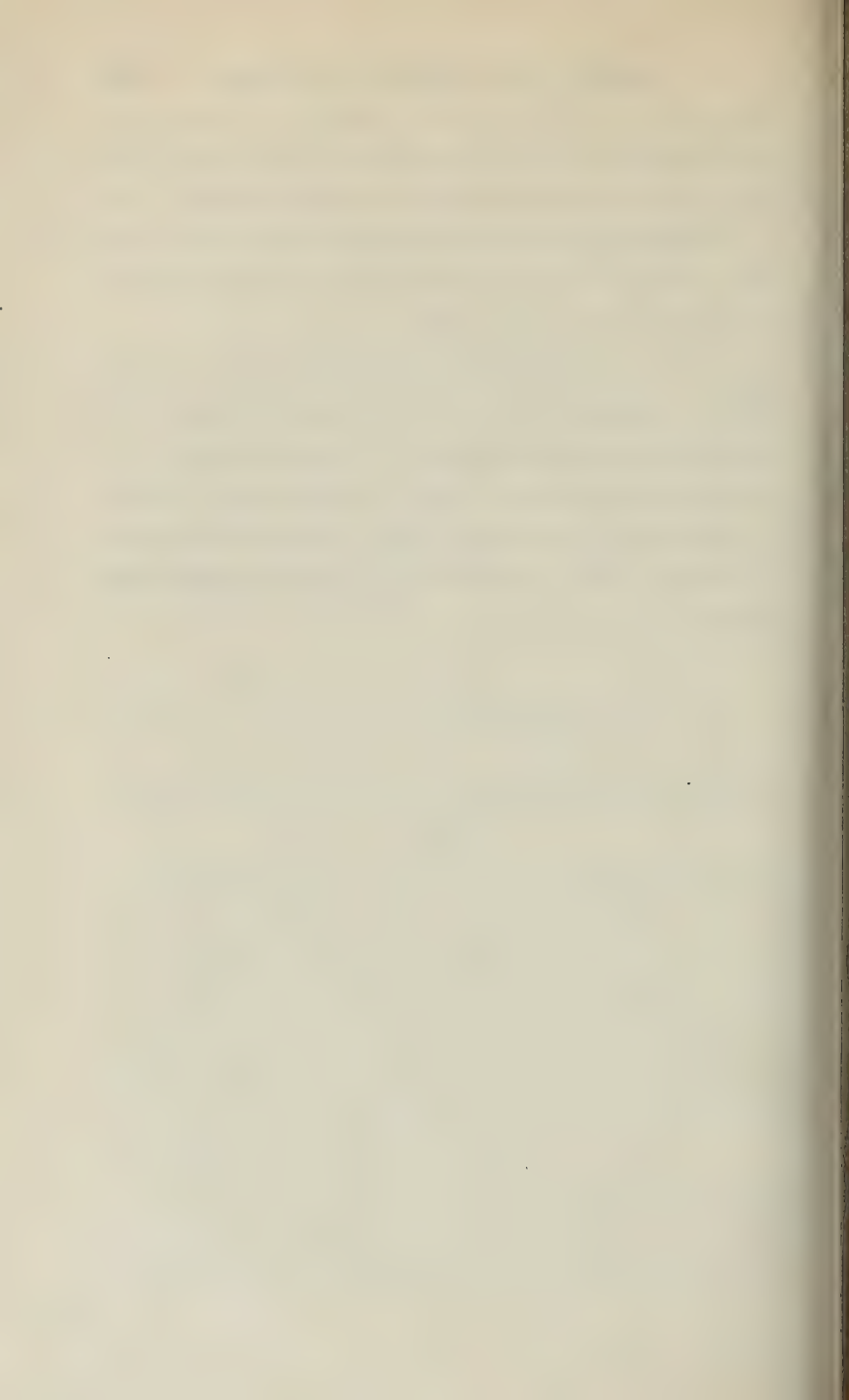
It appearing to the Court from the affidavit of George B. Grigsby, one of the attorneys for the above-named plaintiffs in error, that a writ of error was allowed in the above-entitled cause by the United States District Court for the Second Division of the Territory of Alaska, on August 5, 1916, and that the time for filing the record and docketing of said case was extended by order of said court until and including October 4th, 1916:

And it appearing that the Transcript of Record in said cause was received by the clerk of this court on September 29th, 1916, and that plaintiffs in error

failed to cause the same to be docketed within the time fixed by said District Court of Alaska, as aforesaid, and reasonable excuse appearing therefor; and,

WHEREAS, the record in said cause has not been filed nor said case docketed and no motion has been made to dismiss said cause,

NOW, THEREFORE, on motion of Messrs. George B. Grigsby and Thomas R. White, attorneys for plaintiffs in error, herein, IT IS ORDERED AND DIRECTED that the record in the above-entitled cause may be filed, and said case docketed in the office of the clerk of this court as of the date of October 4, 1916, on payment of the fee required by law.



No. 2891

United States Circuit Court of Appeals
For the Ninth Circuit.

ED JOHNSON and A. C. LAIRD,
Plaintiffs in error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

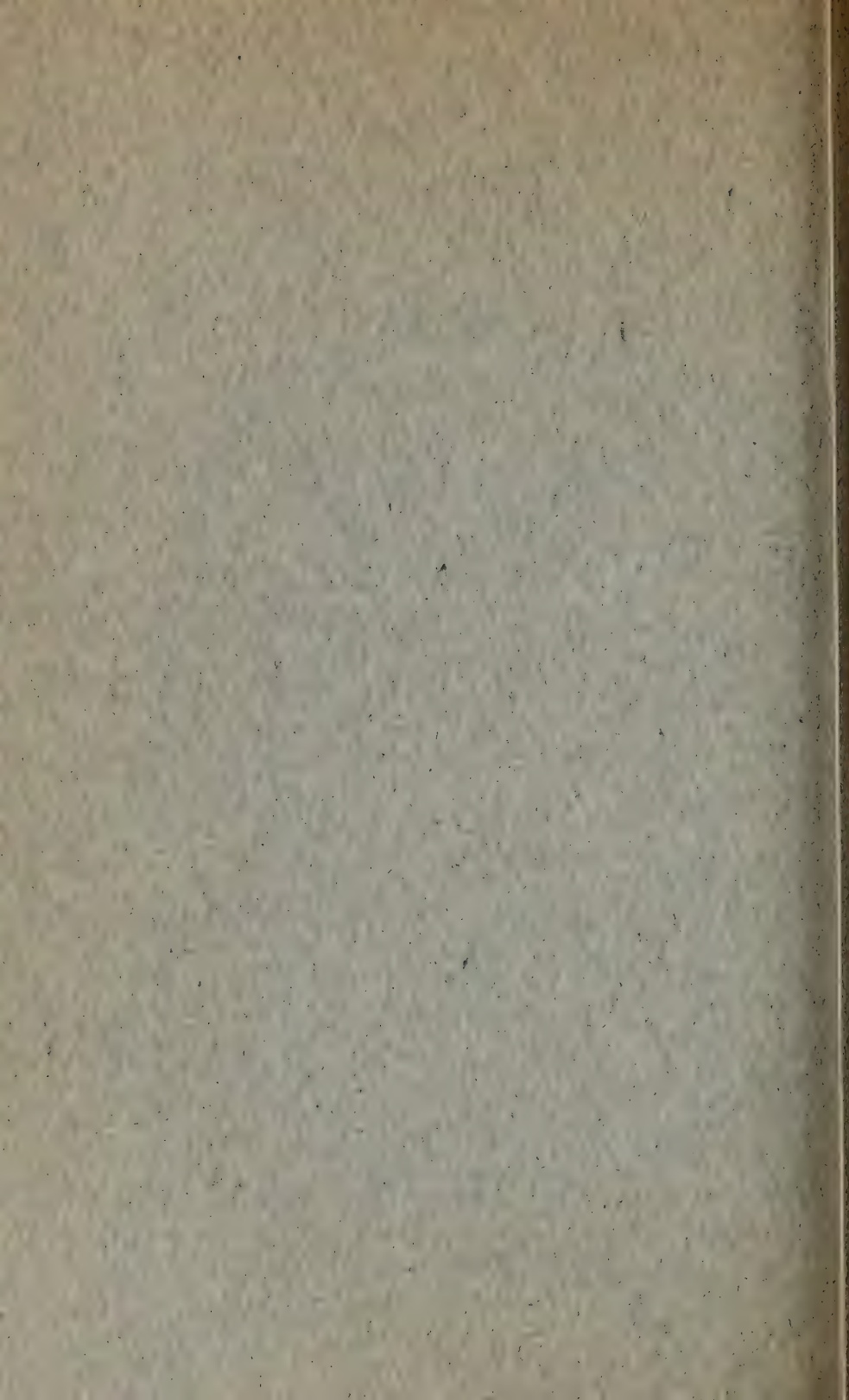
Upon Writ of Error to the United States
District Court of the District of
Alaska, Second Division.

GEORGE B. GRIGSBY
HUGH O'NEILL,
Attorneys for Plaintiffs in Error.

Filed

AUG 15 1917

F. D. Monckton,



No. 2891

United States Circuit Court of Appeals
For the Ninth Circuit.

ED JOHNSON and A. C. LAIRD,
Plaintiffs in error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

The plaintiffs in error were convicted in the United States District Court for the District of Alaska, on the first day of May, 1916, for the crime of gambling. The offense was alleged in the indictment to have been committed on the 5th day of January, 1916, in the Town of Nome, Alaska. Plaintiffs in error and other persons were arrested on the said 5th day of January, 1916, and charged with the offense of gambling by playing games of cards called "Stud poker" and "Pangingui."

The defendants were brought into the Commissioner's Court and demanded a jury trial, but on motion of the U. S. Attorney the U. S. Commissioner proceeded to conduct what is known as a preliminary hearing, over and above the objection of the attorney for the defendants, and after hearing evidence on the part of the government, proceeded to bind over all the defendants with the exception of three, to await the action of the District Court.

It will be contended in this brief that the U. S. Commissioner was without jurisdiction to bind the defendants over as aforesaid, but that it was his duty to have proceeded to try the cases as Justice of the Peace, and that the hearing at the Commissioner's Court, did, in fact, constitute a trial and that such trial constituted jeopardy of the defendants. The plea of former jeopardy was entered to the indictment, also a motion to quash the indictment, on the ground of the former jeopardy, was made by the plaintiffs in error, which motion was overruled by the District Court. The District Court also refused to allow evidence to be admitted to sustain the plea of former jeopardy.

The first trial of the case in the District Court resulted in a mistrial. On the second trial plaintiffs in error were convicted.

The evidence at the first trial consisted principally of the testimony of the witness N. B. Nelson, who testified that he gambled with the defendants at the time and place charged in the indictment and

that he was furnished with money by the United States Marshal for this purpose and was paid for his services in so doing the sum of Sixty-Five Dollars. The United States Marshal testified that he had, in fact, paid the witness Nelson the sum of \$65, from his own personal money. The jury having disagreed, a new trial was ordered and on the second trial the jury panel became exhausted so that it became necessary to issue a special venire in order to complete the jury. Counsels for plaintiffs in error objected to the summoning of the jury by the United States Marshal on the ground of his personal interest in the case, setting up the foregoing facts by affidavit, and moved the Court that a special elizor be appointed to summon the jurors. This motion was not granted but the United States Marshal selected the jury.

Error is assigned upon the refusal of the Court to appoint a special officer to select the jury.

Error is also assigned upon the refusal of the Court to sustain a challenge made by the defendants to the juror W. H. Pearson on the ground of actual bias. The testimony of Pearson is set forth in full in the transcript of record and will be adverted to later.

After the first trial of the case the trial was postponed numerous times upon motion of the District Attorney on the alleged ground that the United States was unable to procure the attendance of cer-

tain witnesses. The defendants were compelled to appear almost daily in court for a period of several weeks and the case continued from day to day upon the statement of the District Attorney that certain witnesses could not be found and frequently the District Attorney insinuated that defendants, or their counsel, were responsible for the absence of the government witnesses, which undoubtedly created a prejudice against the defendants in the minds of the jury and spectators. Error is assigned upon the refusal of the Court to proceed with the trial upon motion of the defendants.

Error is also assigned upon several rulings of the Court with respect to admission or rejection of evidence, as will more fully appear in the specifications of error. Also there are several assignments of error on the instructions of the court and refusal to give instructions, particularly with reference to the witness N. B. Nelson whom the plaintiffs in error contend was an accomplice according to his testimony, and whose testimony, unless corroborated, would, under the laws of Alaska, be insufficient to sustain a conviction.

SPECIFICATIONS OF ERROR RELIED UPON.

I.

That the court erred in overruling the defendants' motion to quash the indictment in this case.

Assignment of Error No. II. (Tr. p. 169.)

II.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of the case from April 17, 1916 until April 18, 1916.

Assignment of Error No. III. (Tr. p. 172.)

III.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 18, 1916, until April 19, 1916.

Assignment of Error No. IV. (Tr. p. 172.)

IV.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 19, 1916, until April 20, 1916.

Assignment of Error No. V. (Tr. p. 173.)

V.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 20, 1916, until April 21, 1916.

Assignment of Error No. VI. (Tr. p. 173.)

VI.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 21, 1916, until April 24, 1916.

Assignment of Error No. VII. (Tr. p. 173.)

VII.

That the court erred in sustaining the motion

of the U. S. Attorney for a continuance of this case from April 24, until April 26, 1916.

Assignment of Error No. VIII. (Tr. p. 173.)

VIII.

That the court erred in overruling the motion of the defendants herein that a special officer be appointed to serve the special venire issued herein upon the 26th day of April, 1916.

Assignment of Error No. IX. (Tr. pp. 173, 174, 175, and 176.)

IX.

That the court erred in denying and overruling the challenge for cause made by the defendants to the juror W. H. Pearson.

Assignment of Error No. X. (Tr. pp. 176, 177, and 178.)

X.

That the court erred in denying and overruling the application of the defendants to exercise a fourth and additional peremptory after the defendants had exhausted the peremptory challenges allowed by law.

Assignment of Error No. XI. (Tr. p. 178.)

XI.

That the court erred in refusing to compel the witness E. R. Jordan to answer a certain question propounded to him by the defendants, as follows:

“Q. How did you employ Nelson and in what respect?

A. I told him to go down and look up any gambling and report to the office. I did that in my official capacity.

Q. Why did you pay him out of your private funds?

A. That is my business.

MR. O'NEILL: Now, if your Honor please, I am not going to stand for the impudence of this witness.

THE COURT: I don't think the witness is impudent. Take your seat. He has a right to pay his own money if he wants to.

MR. O'NEILL: I have a right to know why he paid his own money to show the animus of the witness, if any there be.

THE COURT: He has stated because he chose to do so.

MR. O'NEILL: He said it was his business. I want to know why he chose to do so."

Assignment of Error No. XIX. (Tr. pp. 183 and 184.)

XII.

That the court erred in overruling the objection made by the defendants to the following testimony of the witness Wm. Dougherty, testifying on behalf of the Government, to-wit:

"Some time prior to the 5th of January, 1916, the defendant, Ed Johnson, in my presence, made a statement as to his intention with reference to carrying on gamb-

ling here in Nome. He said he was going to gamble, he intended to gamble.'

MR. GRIGSBY: I didn't notice the question, if your Honor please. I ask leave to have an objection entered on the ground it is too remote, doesn't tend to show whether or not the crime was committed on the 5th of January, as charged in the indictment.

THE COURT: Objection noted and overruled.

WITNESS: (Continuing) That statement was made somewhere along in October, 1915.

MR. GRIGSBY: We move that the answer be stricken out as fixing the time too remote to have any bearing on this case.

THE COURT: Overruled."

Assignment of Error No. XX. (Tr. pp. 184 and 185.)

XIII.

That the court erred in overruling the objection made by the defendant to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

"Q. And what did you report to him?

MR. GRIGSBY: Objected to as calling for a conversation not in the presence of the defendants, or any of them.

THE COURT: Overruled.

A. I reported that there was gambling down in the Arctic Billiard Hall and he

could get them and then I went back and got into the game again."

Assignment of Error No. XXI. (Tr. p. 185.)

XIV.

That the court erred in overruling the objection of the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

Q. Now, with reference as to who was present at your table, I will ask you if this gentleman sitting behind me was at your table. (Counsel turns and points to one of the defendants.)

MR. GRIGSBY: Objected to as leading, if the court please.

THE COURT: Overrule the objection.

A. He was."

Assignment of Error XXII. (Tr. pp. 185 and 186.)

XV.

That the court erred in overruling the objection made by the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

"Q. Had you ever been up there before and seen them gambling?

MR. GRIGSBY: Objected to as calling for proof of another offense, and prejudicial.

THE COURT: Overrule the objection.

A. I had seen them gambling pretty near every night for a week, playing 'stud poker' and 'pangingui.' "

Assignment of Error No. XXIII. (Tr. p. 186.)

XVI.

That the court erred in overruling the objection of the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

"Q. From whom did you buy chips at those previous games?

MR. GRIGSBY: Objected to as being proof of another offense not connected with the crime charged in the indictment.

THE COURT: Overruled.

A. Whoever might be running the game."

Assignment of Error No. XXIV. (Tr. pp. 186 and 187.)

XVII.

That the court erred in overruling the objection made by the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

Q. Did you buy any from Mr. Johnson?

MR. GRIGSBY: Objected to as leading.

THE COURT: Overrule the objection." I think I did."

Assignment of Error No. XXV. (Tr. p. 187.)

XVIII.

That the court erred in sustaining the objection

made by the Government to the following questions propounded by the defendants to the witness N. B. Nelson on cross-examination:

Q. Have you ever done what is called 'stool-pigeoning' before?

MR. SAXTON: Object to that.

THE COURT: Objection sustained."

Assignment of Error No. XXVI. (Tr. p. 187.)

XIX.

That the court erred in sustaining the objection made by the Government to the following questions propounded by the defendants to the witness N. B. Nelson on cross-examination:

"Q. Have you ever done any Gum-shoeing'?

MR. SAXTON: We object to 'gum-shoeing.'

THE COURT: Objection sustained."

Assignment of Error No. XXVII. (Tr. pp. 187 and 188.)

XX.

That the court erred in refusing to permit the defendants to ask certain questions of the witness, N. B. Nelson on cross-examination, as follows:

"Q. Have you ever acted as an informer before?

A. I don't really know the meaning of your term.

Q. Do you understand what the term 'stool-pigeon' means?

A. Yes, sir.

MR. GRIGSBY: I will ask permission to use the language the witness understands, if the Court please.

THE COURT: Overrule the permission."

Assignment of Error No. XXVIII (Tr. p. 188.)

XXI.

That the court erred in sustaining the objection made by the Government to the following question propounded by the defendants to the witness N. B. Nelson on cross-examination:

"Q. Didn't you testify in your former examination on the former trial of this case that all he told you to do was to look up gambling in the town of Nome and report to Phil Holland?

MR. SAXTON: We object to this. This is reduced to writing and signed by the witness and it is improper to ask this witness what he testified to on the former examination without exhibiting to him the writing."

And thereupon, after argument, the court refused to permit counsel to ask the above question without first exhibiting to the witness a paper purporting to be the written transcript of his testimony, to which ruling of the court the defendants then and there excepted and an exception was allowed.

Assignment of Error No. XXIX. (Tr. pp. 188 and 189.)

XXII.

That the court erred in refusing to permit the defendants to ask the witness N. B. Nelson the following question on his cross-examination without first exhibiting to him a paper purporting to be a transcript of his testimony at the former trial, as follows:

"Q. (By Mr. Grigsby:) Now did you at that former trial make the following answer to the following question? (Using transcript of the testimony furnished by Mr. Saxton.) 'Q. Who else was sitting at the table you were sitting at? A. Mr. Laird and myself, Mr. Adams and that man they call the tamale man, Mr. Pierson, and I think the fellow we call "Rube" Johnson, but I am not certain about him.' Did you make that answer?"

MR. SAXTON: We ask that this writing be exhibited to the witness.

THE COURT: Show it to him, Mr. Grigsby.

MR. GRIGSBY: We object to such procedure.

THE COURT: Overruled.

(Mr. Grigsby shows transcript to witness.)

Q. Did you make that answer?

A. I did."

Assignment of Error No. XXX. (Tr. p. 189.)

XXIII.

That the court erred in refusing to permit de-

fendants to propound the following questions to the witness, N. B. Nelson on cross-examination without his showing him the paper purporting to be a transcript of his testimony at the former trial of this case:

“Q. Did you on the former trial of this case testify as follows: (Referring to the stud-poker table.) ‘Q. Was Nick Skorlick at the table? A. I could not positively state, I am not sure, I think he was.’ Did you so answer, did you so state? Can you answer this without looking at this paper?

A. I can.

MR. SAXTON: I object unless the paper is shown to the witness and he can see what his answer was and what the question was.

THE COURT: Show him the paper, Mr. Grigsby.

Q. (Mr. Grigsby continuing after showing witness transcript.) Did you so answer?

A. Yes, sir.

Q. And you answered a minute ago he was not?

A. I don't think he was. I don't know what has happened to change my recollection of it since the former trial.”

Assignment of Error No. XXXI. (Tr. p. 190.)

XXIV.

That the court erred in admitting in evidence

a certain stipulation offered by the Government, as follows:

IN THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, SECOND DI
VISION.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK
KOIBETITZ, JOHN NOVOSEL, NICK
SKORLICH, ALFRED PIERSON, AD-
ELBERT G. GUMAER,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys as follows:

1. That after diligent effort the United States is not able to produce, at the trial of this cause, the following witnesses, to wit, A. Hanson and Elmer Adams.

2. That each of said witnesses, if produced as a witness on the trial of this cause, would refuse to testify to any of the material facts in this cause upon the ground that such evidence would tend to incriminate himself.

3. That this stipulation may be considered in evidence and read to the jury upon the trial of this cause.

F. M. SAXTON,
United States Attorney.

G. B. GRIGSBY,
HUGH O'NEILL.
Attorneys for Defendants.

To which the defendants objected upon the ground that the said stipulation was immaterial, which objection was overruled by the court and an exception allowed defendants to said ruling.

Assignment of Error No. XXXIII. (Tr. pp. 191 and 192.)

XXV.

That the court erred in sustaining the motion made by the government to strike out certain testimony and in sustaining the objection made by the Government to said testimony of the witness Merrill Beatty, a witness testifying on behalf of the defendants, as follows:

“Q. I will ask you to state whether or not in that conversation between you and him in the presence of Ed Young, the proprietor of the Nevada, and Nick Barge, and other persons being present, he stated to you that he had acted as a ‘stool-pigeon’ before?

A. He did.

Q. And got paid for it?

A. Yes, sir.

MR. SAXTON: I move to strike out the answer of the witness and object to the question for the reason it is entirely immaterial.

THE COURT: Motion granted and objection sustained."

Assignment of Error No. XXXIV. Tr. pp. 192 and 193.)

XXVI.

That the court erred in refusing to permit defendants to prove the conversation referred to in the last assignment of error by the witness Ed Young and the witness Nick Barge, as follows:

"MR. GRIGSBY: We offer to prove the same conversation by Ed Young and Nick Barge.

MR. SAXTON: Same objection.

THE COURT: Objection sustained."

Assignment of Error No. XXXV. (Tr. p 193.)

XXVII.

That the court erred in refusing to grant the motion made by the defendants that the court direct a verdict of "Not guilty" as to each of the defendants for the crimes charged in the indictment, and both of them, for the reason that there is no evidence of any gambling for money except that of the witness N. B. Nelson, who is a self-confessed accomplice, the statute of Alaska providing that a

conviction cannot be had upon the uncorroborated testimony of an accomplice.

Assignment of Error No. XXXVI. (Tr. p. 193.)

XXVIII.

That the court erred in refusing to permit the defendants to put in evidence the transcript of the proceedings of the United States Commissioner's Court for the Nome precinct, Second Division, Territory of Alaska, in the case of the United States of America versus Ed Johnson, A. C. Laird and others, for the purpose of showing that the defendants, and each of them, had already been tried for the precise offense charged in the indictment.

Assignment of Error No. XXXVII. (Tr. pp. 193, 194.)

XXIX.

That the court erred in refusing to permit the defendants to prove certain facts by the witness, Mr. Saxton, the U. S. District Attorney, as follows:

“MR. GRIGSBY: I now offer to prove by Mr. Saxton, the District Attorney, the proceedings which took place at the preliminary hearing and to show by him that the defendants have already had a trial for the precise crimes charged in the indictment, the witness Saxton being present in the court.

MR. SAXTON: Same objection.

THE COURT: Objection sustained."

Assignment of Error No. XXXVIII. (Tr. p. 194.)

XXX.

That the court erred in permitting the U. S. Attorney F. M. Saxton, in his address to the jury, to comment as follows:

"Gentlemen of the Jury, the witness, Charles Mason, one of the men who was arrested together with the defendants in this action, has been sworn as a witness in this case, and when asked with reference to what was going on in the Arctic Billiard Parlor at the time of the arrest, in his presence, refused to answer on the ground that said answer might tend to criminate him. Gentlemen of the jury, what was going on there at that time that he was unwilling to tell about for fear it might incriminate him? You know perfectly well what was going on. There was a crime being committed there and you know perfectly well what crime it was."

Assignment of Error No. XL. (Tr. p. 195.)

XXXI.

That the court erred in giving the jury the following instruction, being a portion of Instruction No. 4, as follows:

"It is the duty of the Judge of this court to instruct you upon the law applicable to the case, and the statute makes it your duty to accept as law what is laid down by the court as such in these instruc-

tions, and if you should knowingly refuse to do so you would be liable as for contempt of court."

Assignment of Error No. XLI. (Tr. pp. 195, 196.)

XXXII.

The court erred in giving the following instructions to the jury, being instruction No. 5½.

"I instruct you that the testimony of one witness, if believed by you, is sufficient to establish any material fact in the case unless such witness is an accomplice. If you believe from the evidence that the witness N. B. Nelson was employed by the United States Marshal for this division to engage in the apprehension of persons violating the law by gambling, and that in pursuance of said employment the said Nelson engaged in a gambling game, if any with the defendants, then I instruct you that said Nelson is not an accomplice with the defendants, and you should give his testimony the same weight and consideration as you would have done if he had been present and had testified to the same matters without participating in the game.

"On the other hand, if you believe from the evidence that the said witness N. B. Nelson was not employed by the United States Marshal or that he did not engage in the gambling game, if any, with the defendants for the purpose of apprehending them, then I instruct you that he was an accomplice and his testimony connecting the defendants with the game, if any, must be corroborated by some other evidence

which tends to connect the defendants with the game. However, his testimony as to the character and elements of the game need not be corroborated even though he be an accomplice. In other words, the testimony of an accomplice is sufficient, if you believe it, to establish that a certain game played with cards for money, checks, chips or credits of value was being played at a certain time and place, without any corroboration whatever. But his testimony as to who was engaged in or connected with the game, if any, must be corroborated by some other evidence tending to connect the defendants with the game.

“Hence, the testimony of said witness, N. B. Nelson, whether you find that he was an accomplice or not, if you believe it, is sufficient to establish the kind of a game that was being played, if any; the means or instrumentalities used in playing such game, if any; and the nature and the value of the ‘stakes’ for which such game was being played, if any. However, his testimony, if any, connecting the defendants with the game, must be corroborated as heretofore stated, in case you find him to be an accomplice, but not otherwise.”

Assignment of Error No. XLII. (Tr. pp. 196, 197.)

XXXIII.

That the court erred in instructing the jury as follows, being Instruction No. 5½A.

“The government has introduced certain evidence in this case tending to show that the defendants were playing for certain

chips on which the value in trade of each chip is printed. I instruct you that the printing of each of such chips is sufficient evidence to establish the value thereof, since no evidence has been introduced to explain or contradict the printing thereon."

Assignment of Error No. XLIII. (Tr. pp. 197, 198.)

XXXIV.

That the court erred in instructing the jury as follows, being Instruction No. 7:

"The owner or lessee of a building or room cannot lease or sub-let such building or room for an unlawful purpose or knowingly permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts transpiring in such building or room. If you should find from the evidence in this case that one of the defendants held the room in which gambling is alleged to have been conducted under a lease from the owner, and you further find that gambling as alleged was being conducted there, then I instruct you that such owner or lessee is guilty if he knew that such gambling was being carried on there whether he had any connection with the game or not.

"It follows, therefore, that if you find gambling was being carried on in the room known as the Arctic Billiard room or Parlor, and that said room was being held by defendant under a lease from the owner, either oral or written, then I instruct you

that such defendant is guilty if he knew that such room was being used for the purpose of gambling, and a game of stud poker or pangingui played with cards for money or chips of value was had in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist.

“Again, if you find that the game of stud poker or pangingui was played with cards for money or chips of value on the night in question, in said room, and the defendant had anything to do with said game such as dealer, player, owner, proprietor or employee, then I instruct you that the defendant is guilty, and it does not matter whether he was the lessee or owner of said room and had previous knowledge of said game or not.”

Assignment of Error No. XLIV. (Tr. pp. 198, 199.)

XXXV.

That the court erred in instructing the jury as follows, being Instruction No. 8:

“I have permitted evidence to be introduced in this case tending to show gambling to have been carried on in the room known as the Arctic Billiard room at other times prior to the time alleged, for the purpose of establishing the knowledge of the owner and lessee of said room that gambling was being carried on there, and you should consider it for no other purpose. As to what extent such testimony tends

to show such knowledge on the part of the defendant is for you to determine.”

Assignment of Error No. XLV. (Tr. p. 199.)

XXXVI.

That the court erred in instructing the jury as follows, being Instruction No. 9:

“There has been some testimony tending to show that the defendant, Ed Johnson has made statements to the effect that he intended to gamble in spite of law and the efforts of officials to stop him. You should consider his testimony only in determining the guilt or innocence of said defendant, Ed Johnson. You should not consider it as affecting the guilt or innocence of the other defendants.”

Assignment of Error No. XLVI. (Tr. p. 300.)

XXXVII.

That the court erred in refusing to give the following instruction requested by defendants:

“You are instructed that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendants with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or of the circumstances of the commission.”

Assignment of Error No. XLVII. (Tr. p. 200.)

XXXVIII.

That the court erred in refusing to give the following instruction requested by the defendants:

“You are instructed that if you believe from the evidence in this case the witness N. B. Nelson, to have been an accomplice of the defendants, or any of them, with relation to the crime or crimes charged in the indictment, then you are instructed that unless the evidence of the witness N. B. Nelson with relation to the crime charged be corroborated, by other evidence tending to show that the defendants, or some of them, actually played cards for money, then you should acquit.

It is not sufficient, in case you find N. B. Nelson to have been an accomplice, that his evidence be corroborated with respect to matters which do not necessarily involve the guilt of the accused. He must be corroborated in matters which bear directly upon the guilt of the accused of the offense of gambling.”

Assignment of Error No. XLVIII. (Tr. pp. 200, 201.)

XXXIX

That the court erred in refusing to give the following instruction requested by the defendants:

“The indictment in this case charges the defendants with having played certain games of cards for money at the time and place charged in the indictment. If you are satisfied from the evidence that the defendants, or any of them, did actually play the game of cards mentioned in the

indictment at the time and place charged, then it will be for you to determine whether or not such a game or games were played for money or representative of value, and in determining this necessary element of the crime charged, you are instructed that a conviction cannot be had upon the uncorroborated testimony of an accomplice, and if you should find from the evidence that the witness N. B. Nelson was an accomplice and there is no other testimony in the case than his tending to prove that gambling actually took place, then it will be your duty to acquit the defendants."

Assignment of Error No. XLIX. (Tr. pp. 201, 202.)

XL

That the court erred in refusing to give the following instruction requested by the defendants:

"You are instructed that the testimony of an accomplice should be viewed with distrust."

Assignment of Error No. L. (Tr. p. 202).

XLI.

That the court erred in refusing to give the following instruction requested by the defendants:

"Evidence has been introduced in this case tending to show that one Charles Mason was present in company with the defendants at the time of the arrest of the defendants for the crimes charged in the indictment. The said Charles Mason was called as a witness for the Govern-

ment in this case and refused to answer certain material questions propounded to him, basing his refusal on the ground that his answer to the questions might tend to criminate him.

“You are instructed that you are not to draw any inference prejudicial to the defendants in this case on account of said refusal on the part of said Mason to answer such questions, and such refusal should in no way be considered by you in determining the guilt or innocence of the defendants, or any of them.”

Assignment of Error No. LI. (Tr. pp. 202, 203).

XLII.

That the court erred in refusing to give the following instruction requested by the defendants:

“You are instructed with reference to a certain stipulation introduced in evidence in this case and marked Plaintiff’s Exhibit ‘H,’ which stipulation is to the effect that certain witnesses, if present, would refuse to answer any material questions propounded to them, basing their refusal on the ground that their answers to such questions might tend to criminate them, that such stipulation has no probative force whatever and should not be considered by you at all in determining the guilt or innocence of the defendants, and that if the witnesses mentioned in said stipulation had been present in court and refused to answer on the grounds mentioned, such refusal would

in no way tend to prove the guilt of the defendants."

Assignment of Error No. LII. (Tr. p. 203).

XLIII.

That the court erred in refusing to give the following instruction requested by the defendants:

"You are instructed that the defendants are presumed to be innocent until their guilt is established to a moral certainty and beyond a reasonable doubt. They are clothed with this presumption, not only at the outset but during all stages of the trial and until the jury determines otherwise."

Assignment of Error No. LIII. (Tr. pp. 203, 204).

XLIV.

That the court erred in refusing to grant the following instruction requested by the defendants:

"The evidence in this case shows that E. R. Jordan paid the witness N. B. Nelson a sum of money out of his own personal funds to investigate gambling conditions in the town of Nome. You are instructed that no private person can hire another to participate in a criminal offense even though such participation be for the purpose of detecting other guilty persons and relieve such participant from criminal responsibility, therefore if you believe from the evidence that E. R. Jordan hired the witness Nelson and paid him out of his own personal funds and that the said Nelson participated in the game pursuant

to said employment, the said Nelson would be and is an accomplice of all engaged in said game."

Assignment of Error No. LIV. (Tr. p. 204).

XLV.

That the court erred in instructing the jury after they had retired to deliberate upon their verdict and had been recalled into court, as follows:

"Gentlemen of the Jury: Upon the evidence and instructions in this case you should be able to reach a verdict.

"The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.

"Now, I shall give you a longer time for a further and more serious consideration of this case. When you retire to the jury-room again, read over the instructions of the court carefully and if there is anything about them you do not understand, so advise the court and I will endeavor to make the same plain to you. It is your duty to arrive at a verdict in the case according to the evidence and the instructions given you, irrespective of all other considerations."

Assignment of Error No. LV. (Tr. pp. 204, 205).

XLVI.

That the court erred in rendering and entering judgment against the defendants upon the verdict.

Assignment of Error No. LVI. (Tr. p. 205).

ARGUMENT

I.

The contention made in the first specification of error, viz., that the court erred in overruling the defendants' motion to quash the indictment, is based upon two grounds. First, that the action of the United States Commissioner and Justice of the Peace in refusing defendants a trial on a misdemeanor charge, of which that official had jurisdiction, deprived defendants of their constitutional right to a speedy trial, contrary to the provisions of the Sixth Amendment to the Constitution of the United States. This proposition is fully sustained by the following authorities, particularly by "*Ex parte Donnelly*" as follows:

"After a careful consideration of this case we have finally come to the conclusion that justices of the peace have no jurisdiction to entertain preliminary examinations in cases of misdemeanor where the fine does not exceed \$500.00 and the imprisonment does not exceed one year, but that they have jurisdiction to finally try and determine such cases. It therefore follows that the preliminary examination had in the present case was and is void and the petitioners are therefore entitled to be discharged."

In re Donnelly, 1 Pac. 648;

In re Crandall, 54 Pac. 686;

State v. Lund, 30 Pac. 518;

Ex parte Pruitt, 13 So. 317.

The only cases to be found which seem to negative our contention are *U. S. v. Folsom*, 3 Alaska 226, and the dissenting opinion of Judge Brewer in *Ex parte Donnelly*. The latter, however, has not been followed by any court, while the majority opinion is cited with approval by numerous authorities, including those above cited.

In the case of *U. S. v. Folsom*, 3 Alaska 226, the decision of the court was based upon the fact that the prosecution was under a special statute, viz., Section 474 of Carter's Code; Section 2583 of Compiled Laws of Alaska. The case recognizes the principle that in ordinary misdemeanors the justice of the peace having jurisdiction should proceed to try the case, and in no way conflicts with the authorities above cited.

Second, that the proceedings before the magistrate who bound the defendants over to the District Court did in fact constitute a trial and jeopardy of the defendants. This question is also raised by the defendants' plea to the indictment of former jeopardy. In support of this contention we cite:

Brown v. State, 16 So. 929.

The above case is decisive of the question.

The reason the question of former jeopardy was raised on the motion to quash is that the laws of Alaska prescribe that former jeopardy must be pleaded by pleading either a former judgment of conviction or acquittal of the crime charged. It

was exceedingly difficult for the counsel for the defendants to determine whether to view the proceedings before the Justice of the Peace as constituting a conviction or acquittal. Therefore the question was raised both by plea of former jeopardy and by a motion to quash.

In the motion to quash and affidavit in support thereof, the denial to the defendants of a speedy trial is not assigned as a ground for such motion. However, we assume that the facts set up in support of the motion will be taken as constituting the real reasons why it should have been sustained. The facts show that the defendants were charged with the commission of a misdemeanor, to-wit, the crime of gambling. The complaint is in the ordinary form of complaints usually filed in Justice Court. The proceedings for the trial of criminal actions in Justice Court are set forth in Chapter 42, Sections 2520-2549, Compiled Laws of Alaska. The U. S. Attorney, however, proceeded to treat the case as brought under the provisions of Chapter 34, page 756, and, upon his advice, the U. S. Commissioner and *ex officio* Justice of the Peace refused to grant the defendants a trial, but proceeded to treat the case as a preliminary hearing and at its conclusion bound the defendants over to the District Court. This proceeding resulted in their being compelled to give bail and in their being held up to the public for several months as accused

persons, in spite of the fact that all the evidence to be used in their prosecution was available to the District Attorney. This is not only an illegal method of proceeding in misdemeanor cases, but carries in its train many evil consequences. If this procedure can be used in a gambling case, it can be used in any other misdemeanor case,—in a case of simple assault, in a case of trespass, where the limit of punishment is a fine of \$50.00. The grand jury in the Second Judicial Division of Alaska never sits more than twice a year, and not necessarily more than once a year. It is a necessary evil that persons accused of felonies must endure the hardship of waiting for a trial until they have been indicted by a grand jury,—a hardship that has been avoided by most of the State Constitutions. In Alaska, however, this hardship cannot be avoided in felony cases, for the reason that the Constitution of the United States requires that no person shall be tried for a felony except upon a previous indictment by a grand jury. In misdemeanor cases, however there is no excuse for such a practice. It is not necessary and is capable of great abuse. It is not sustained by any authorities in any court.

II.

The second, third, fourth, fifth, sixth and seventh specifications of error relied upon relate to the fact that six separate continuances were granted to the United States upon the statement of the

District Attorney to the effect that the attendance of certain witnesses could not be procured.

Section 2221, Compiled Laws of Alaska, is as follows:

“That when an indictment is at issue upon a question of fact, and before the same is called for trial, the court may, upon sufficient cause shown by such affidavits as the defendant may produce, or the statement of the District Attorney, direct the trial to be postponed to another day in the same term or to another term; and all affidavits and papers read on either side upon the application must be first filed with the clerk.”

The proceedings with reference to the granting of these continuances are fully set forth in the transcript of record, pages 38 to 43. It must be apparent from a reading of the account of these proceedings that the defendants were greatly prejudiced thereby. It is true that the section above quoted justifies the continuance of any criminal action after indictment to another day in the same term or to another term, and that the statement of the District Attorney, that official being under his official oath, is taken as a sworn statement. It does not follow, however, that the District Attorney is clothed with the power which will justify the court in allowing the case to be repeatedly and indefinitely continued, with the result that the defendants are compelled to keep, not only themselves, but their witnesses at hand day after day upon the

statement of the prosecuting officer that he has been unable to find certain witnesses which the Government deems necessary for the prosecution of the case. It will be seen from the transcript that the District Attorney was repeatedly requested to move for a continuance of the case to some day certain and far enough ahead so that he would be able to secure the attendance of the Government witnesses if they could possibly be procured. This he refused to do. Some discussion followed and the attitude of the court was plainly shown by the court's remark, as follows:

“MR. O’NEILL: I think the District Attorney should be compelled to set this case far enough ahead so he can get his witnesses here.

THE COURT: I don’t care to hear any argument in this case. As long as there is any possibility of finding these witnesses I am going to continue this case over from day to day and that possibility will be determined by the information I get from the District Attorney.” (Tr. p. 39).

Following that, several additional continuances were granted from day to day on the ground, as stated in the transcript, that the marshal reported that he was still unable to find the missing witnesses. It is apparent from the fact that the District Attorney requested the case to be continued from day to day that the witnesses he expected to find were near at hand; also that their precise

whereabouts was unknown to the Federal authorities, otherwise it would have been possible for the District Attorney to fix a day when he would be ready to proceed to trial. The attitude of the court and the other proceedings, as shown by the transcript of record, must necessarily have left an impression in the minds of the petit jury, who may be presumed were present during all the proceedings, as well as the general public, that some attempt had been made by the defendants or their attorneys to prevent the attendance of the witnesses sought by the Government. No showing, however, was made by the District Attorney as to any of these matters. The statement of counsel for the defendants (Tr. p. 41) describes the situation as it existed at the time, and is as follows:

“MR. GRIGSBY: Now if the court please, there has been no showing made by the District Attorney to the effect that defendants are in any way in fault in this matter, or their counsel, and these defendants have been here every day for seven days. They are indicted, they are presumed to be innocent, they are not culprits, they should not be held up to the community as culprits, they have a right to a speedy trial unless there is some ground for refusing them. In any event they should not undergo the hardship of being hauled up here day after day. When this case is continued for a day it is continued for trial and they have to be here. Now the District Attorney should show the court when he will be ready

and not continue this case indefinitely. He has made no showing whatever in the premises. It looks very much as if there was an attempt to punish these defendants who have not been convicted of anything because the State has not got these witnesses. I very much doubt if your Honor has any jurisdiction to compel them to attend court day after day in the absence of any showing. The District Attorney hasn't shown he will be ready, that he expects to be ready, or taken steps that he can be ready and he should not ask to have this case set for a day when he doesn't know whether he will be ready for trial or not. Let him announce the day he will be ready. We have some rights, legal rights. Supposing on the part of the defendants I come up here and say, 'I cannot get my witnesses, they are hiding somewhere,' would your Honor grant a continuance indefinitely from day to day to these defendants? We have as much right as the prosecution in that regard and we insist at this time that this trial proceed this morning.

THE COURT: The case will go over until Wednesday morning at 10 o'clock.

MR. GRIGSBY: I wish to make a motion in this case. The defendants, and each of them, move that this prosecution be dismissed for the reason that defendants have not been accorded a speedy trial in accordance with their constitutional rights and we object to any continuance.

THE COURT: Motion overruled.

To which ruling of the court defendants excepted and an exception allowed."

We contend that in the granting of separate continuances above referred to error was committed, not only in depriving defendants of a speedy trial, but in prejudicing them before the jury and community. The truth of this contention seems so apparent that we deem it unnecessary to cite authorities to sustain it.

III.

The eighth specification of error relates to the overruling by the court of the motion made by the defendants that a special officer be appointed to serve the special venire issued herein upon the 26th day of April, 1916. The motion and affidavit in support thereof are set forth in the transcript of record, pages 43 to 46. Argument on the motion may be found in the transcript of record, pages 46 to 49. This specification of error relates to Assignment of Error No. IX (Tr. pp. 173-176).

Section 803, Revised Statutes, is as follows:

"Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the case, by such fit person as may be specially appointed for that purpose by the court, who shall administer

to him an oath that he will truly and impartially serve and return the writ."

Section 804, Revised Statutes is as follows:

"When from challenges or otherwise there is not a petit jury to determine any civil or criminal case, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section."

It appears from the affidavit in support of the motion that a special officer be appointed to complete the jury panel that there had been a previous trial of the defendants which resulted in a disagreement. At the previous trial, the only witnesses against the defendants of any consequence were several deputy marshals and a person employed by the United States Marshal to act as a spy or informer and, in such capacity, to engage in a game of cards for money with the defendants and furnish information to the United States Marshal upon which to base a prosecution; that the prosecution wholly originated in the Marshal's office; that at least one of the deputy marshals had threatened the defendants; that the defendants were arrested

without a warrant by the deputy marshals on information furnished by one N. B. Nelson, who had been employed by the United States Marshal for that purpose; that the marshal had paid the said N. B. Nelson with his own private funds. When the case came up for the second trial and the regular panel became exhausted, it became necessary to complete the same by ordering a special venire. We contend that the proceedings with respect to the special venire or venire facias are controlled in Alaska by provisions of the sections of the Revised Statutes above quoted. Whether or not this is true, the principle that the summoning officer must be disinterested and impartial is equally applicable. One of the leading cases on this question is *Koontz v. State*, 10 Okla. 553, Ann. Cas. 1916 A, 689. This case contains a review of the authorities on the subject. Several authorities are cited therein which disqualify a summoning officer on the ground that he is a witness for the prosecution.

State v. Kent, 4 N. D. 601.

The United States Marshal in the case at bar was a witness for the prosecution, also several of his deputies. Not only that, he had spent his own money to secure evidence. It is in accordance with all the laws of human nature that he was interested in securing a conviction.

“It is essential to the fair and impartial administration of justice that an

open or special venire shall be summoned by an officer who is not disqualified by reason of interest, bias, or prejudice."

Harjo v. U. S., 98 Pac. 1021.

(See, also case note to *Koontz v. State*, Ann. Cas. 1916 A, 693).

The following from the case of *Woods v. Rowan*, 5 Johns. 133, is applicable:

"It is true that the sheriff no longer selects the whole panel, and that it now is his duty to summon all such persons as shall have been previously balloted by the clerk; and hence it is argued, that the challenge to the array in this case, was properly overruled. I cannot accede to this conclusion. The sheriff certainly may select such of them as he may suppose will best subserve his purpose, and by summoning them, and omitting to summon the rest, he may in many cases as effectually pack a jury as if he had the power of selecting the whole panel. The impartial and equal administration of justice renders it dangerous to trust the sheriff with such a power. It is no answer to this objection to say that it is not to be presumed the sheriff will prostitute his office to such purposes. It is because he may do it, that the law interposes; and if he may, that is decisive of the question."

In the following cases, the fact that the sheriff had formed an unqualified opinion of the

guilt of the defendants was held ground for challenge:

People v. Coyodo, 40 Cal. 586;

People v. LeDoux, 102 Pac. 517;

People v. Vasquez, 99 Pac. 983;

We cannot conceive of a clearer case of disqualification of a summoning officer than the present one, nor how it can be contended that the United States Marshal in this case was an indifferent person, within the meaning of Section 803, Revised Statutes.

IV.

The ninth and tenth specifications of error relate to the denying and overruling by the court of a challenge for cause made by the defendants to the juror W. P. Pearson. The examination of the Juror Pearson is set forth on pages 51 to 62 of the transcript of record. After testifying that he had a fixed opinion in the case as to the guilt or innocence of the defendants which it would take evidence to remove, the juror testified as follows:

“Q. Now you are sure that you have a fixed opinion as to the guilt or innocence of some of the defendants. I will ask you if you were charged with the crime of gambling if you would be satisfied to be tried by a juror in your present frame of mind as regards this case?

A. Well, no, I don't think I would.

Q. Do you think it would be fair to be tried by jurors in your present frame of mind?

A. No, sir.

* * * * *

Q. Supposing every juror here had your present fixed opinion relating to the guilt or innocence of these defendants, and you were the defendant, would you be satisfied to be tried by that kind of a jury?

A. I would if I could prove I was innocent.

Q. If you could prove you were innocent?

A. Yes, sir."

These questions and answers indicate the frame of mind of the juror. To be sure, he answered several of the usual cut and dried questions propounded by the court and by the District Attorney, most of which questions were leading, to the effect that he could lay aside his opinion and try the case solely on the evidence, and would, if sworn as a juror, so do. On his direct examination as to his qualifications when questioned by the District Attorney this juror absolutely qualified to sit on the case. His cross-examination, however, reveals so plainly his unfitness to try the case that little argument is necessary. We submit this assignment of error upon the record.

V.

The 11th specification of error relates to er-

rors of the court committed with respect to the examination of the witness E. R. Jordan, the United States Marshal, who testified in behalf of the Government. His testimony is set forth in full on pages 90 to 93 of the transcript of record. He answered seven distinct and separate questions propounded by defendants' counsel by saying, "That is my business." The particular question to which defendants' counsel insisted upon an answer relating to the employment by the witness Jordan of the man Nelson, who was employed by Jordan to investigate gambling in Nome. (See Tr. p. 90). The question was as follows:

"Q. Why did you pay him out of your private funds?

A. That is my business.

MR. O'NEILL: Now, if your honor please, I am not going to stand for the impudence of this witness.

THE COURT: I don't think the witness is impudent. Take your seat. He has a right to pay his own money if he wants to.

MR. O'NEILL: I have a right to know why he paid his own money to show the animus of the witness, if any there be.

THE COURT: He has stated because he chose to do so.

MR. O'NEILL:—He said it was his business. I want to know why he chose to do so."

We are not aware that the United States Marshal has any more privileges and exemptions

when on the witness stand than any other citizen. He was a witness for the Government. His motives and prejudices were matters of legitimate inquiry by the defendants' counsel. It appears that, for the purpose of investigating certain suspected violations of the law relating to gambling, he employed a detective out of his own personal funds. Why he was so interested in this particular line of investigation as to incur personal expense was a matter which the jury was entitled to know. It was not privileged. That the court should have compelled the witness to have answered the question set forth above is so self-evident that there is no need of authority on the proposition.

The attitude of the witness Jordan during his entire cross-examination must also reveal to the court that he was a totally unfit person to be intrusted with the duty of selecting jurors to try case, which matter is completely discussed in the argument relating to the eighth specification of error. A further discussion under this head is probably out of place, except that if it is apparent to the court from the general conduct of the case from beginning to end that the defendants were not accorded a fair trial, this court will consequently look carefully into the errors assigned, some of which, taken by themselves, may seem somewhat trivial. With respect to the examination of the United States Marshal Jordan the defendants were practically denied the right of cross-examination.

VI.

The 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th specifications of error are among those which might be classed as trivial and, by themselves, probably not worth discussion. They are relied upon for the purpose announced above of showing the court that the general conduct of the trial was distinctly unfavorable to the defendants.

VII.

The 21st, 22nd and 23rd specifications of error relate to the refusal of the court to permit the defendants to propound certain impeaching questions to the witness N. B. Nelson on cross-examination. These questions related to his testimony given at the first trial of the defendants. It was sought to prove that on the first trial of the defendants the witness Nelson made certain statements inconsistent with his testimony at the second trial. Upon the questions being propounded to Nelson, the United States Attorney produced a certain document which he claimed to be a transcript of Nelson's former testimony. The cross-examination of Nelson (Tr. pp. 106, 107) clearly shows that Nelson's testimony at the previous trial was oral. It appears that it had been taken down in shorthand by some person in the employ of the United States Attorney, transcribed and signed by the witness. The United States Attorney objected to

the impeaching questions on the ground that the testimony of the witness had been reduced to writing and signed by him and that the writing must be exhibited to the witness before he could be examined with respect to any statements made therein. To sustain this contention, he relies upon Section 1502 of the Compiled Laws of Alaska, which is as follows:

“Section 1502. A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony, but before this can be done the statements must be related to him with the circumstance of times, places and persons present, and he shall be asked whether he had made such statements and, if so, allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them.”

The United States Attorney (Tr. p. 107) relied upon *State v. Crockett*, 65 Pac. 447. In that case the witness was being examined with reference to a written statement of his testimony previously given orally at a coroner's inquest which was reduced to writing, and the court held that the witness could not be examined with reference to such testimony without first being shown the writing. In such a case, however, the testimony given before the coroner is by law required to be reduced to writing and has a certain legal effect as prima facie evidence of what the witness swore to and

is generally required to be signed by the witness. No case can be found, however, where the right to test the recollection of a witness or his credibility can be prejudiced by the simple fact that, without any authority of law, some person has reduced his oral testimony to writing and caused him to sign it. The typewritten transcript produced by the District Attorney could have no more legal effect in abridging the right of cross-examination than the written statement of any person's testimony taken down by any person. The witness was being questioned as to previous oral statements. He was confronted with questions which implied that his previous testimony was not in accordance with his present testimony. To safeguard him from being broken down and having his credibility destroyed, the District Attorney influenced the court to misapply the law as announced in Section 1502. This is another instance in the trial of the right of cross-examination being unwarrantably restricted by the court, to the prejudice of the defendants, and one of the errors which cannot be classed as trivial.

VIII.

The 24th specification of error relates to the admission in evidence of a certain stipulation offered by the Government, to the effect that if the Government had been able to produce certain witnesses on the trial they would have refused to testify with respect to any material facts in the

case, on the ground that such evidence would tend to incriminate themselves. The stipulation is as follows:

"IN THE DISTRICT COURT FOR THE DIS-
TRICT OF ALASKA, SECOND DIVISION
 THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK
 KOIBETITZ, JOHN MOVOSSEL, NICK
 SKORLICH, ALFRED PIERSON, ADEL-
 BERT G. GUMMAER,

Defendants.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys as follows:

1. That after diligent effort the United States is not able to produce, at the trial of this cause, the following witnesses, to-wit: A. Hanson and Elmer Adams.

2. That each of said witnesses, if produced as a witness on the trial of this cause, would refuse to testify to any of the material facts in this cause upon the ground that such evidence would tend to incriminate himself.

3. That this stipulation may be considered in evidence and read to the jury upon the trial of this cause.

F. M. SAXTON,
 United States Attorney.
 G. B. GRIBSBY,
 HUGH O'NEILL
 Attorneys For Defendants."

It will be noted that the third paragraph of this stipulation provides that the stipulation may be considered in evidence and read to the jury upon the trial in this case. In spite of this provision, however, the defendants' counsel objected to its admission on the ground that the same was immaterial. At the time of the introduction of the stipulation, counsel for defendants waived any constitutional rights that defendants might have as to the right of the defendants to be confronted with the witnesses against them.

Notwithstanding this waiver, and notwithstanding the provisions of the stipulation that the same might be read in evidence, we are of the opinion that the court erred in allowing its admission. It evidently was introduced for the purpose of prejudicing the jury against the defendants. It was no doubt intended by the United States Attorney that the jury would draw the inference from the refusal of the witnesses A. Hanson and Elmer Adams to testify on the ground that their testimony might criminate themselves that the defendants were guilty of some crime. The law allows no such inference to be drawn, nor does the law permit defendants to be bound by any waiver of their constitutional rights. The admission of such a stipulation in evidence was prejudicial error.

Beach v. U. S., 46 Fed. 754;

Wigmore on Evidence, Vol. 4, Sec. 2272,
p. 3147;

People v. Maunau, 26 N. W. 797.

It must be apparent to the court, when it is noted that witnesses A. Hanson and Elmer Adams were two of the missing witnesses on account of whose absence several continuances of the case were granted, that the defendants' counsel were forced to enter into the stipulation in order to obtain a trial. After being compelled to come into court day after day, and being threatened by the announcement of the court that they would continue to be thus forced to come into court day after day indefinitely until certain witnesses were procured, in order to escape the hardship of such treatment, they were forced to enter into a stipulation waiving their constitutional rights and consenting to the admission of immaterial and prejudicial matter. The court must be impressed with the extreme unfairness of the conduct of the trial of the case at bar in this and other respects.

IX.

The 25th and 26th specifications of error relied upon relate to the error of the court in striking out certain testimony of Merrill Beatty, a witness testifying on behalf of the defendants, whose testimony impeached that of the Government witness N. B. Nelson. Proper foundation for the impeaching question was laid in the cross-examination of Nelson (See Tr. p. 102). Comment seems unnecessary.

X.

The 27th specification of error relates to the refusal of the court to grant the motion made by the defendants at the conclusion of the Government's case that the court direct a verdict of not guilty as to each of the defendants of the crimes charged in the indictment. This motion was based upon the ground that the witness N. B. Nelson, according to all the evidence in the case, was an accomplice of the defendants. The laws of Alaska provide that a conviction cannot be had upon the uncorroborated testimony of an accomplice. Section 2262, Compiled Laws of Alaska, is as follows:

"That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

The question as to whether participants in a game of cards played for money are accomplices of each other in the crime of gambling is one on which the authorities differ, some holding that they are, and others that they are not, accomplices. The latter authorities maintain that each participant is guilty of an independent crime. How this conclusion can be arrived at is difficult to understand, for no person can gamble by himself. There must

be at least two persons engaged to constitute a game, whether for money or otherwise.

In *Davidson v. State*, 33 Ala. 350, in discussing this question, the court says:

“Our argument does not involve the position that adversaries in fact are accomplices in law; antagonists in playing cards are not adversaries as to the thing which constitutes the offense. They agree together as to the playing at a game with cards and each voluntarily contributes to that end and they are adversaries as to which shall perform his part in the game with the highest skill. There is a perfect agreement among the players that each shall perform his part, and the strife between them is which shall do it most skilfully.”

The general test as to what constitutes an accomplice is whether or not the person in question could have been convicted as a principal.

“To constitute an accomplice one must be so connected with a crime that at common law he might himself have been convicted either as the principal or as an accessory before the fact.”

People v. Bright, 96 N. E. 362.

“The acts of at least two persons concurring together are necessary to effect a violation of the statute, and I have no doubt there is such a connection between dealer and the party who bets as to constitute one the accomplice of the other. Both are necessary, and each performs his

part of the acts which the law denounces as criminal, and the fact that each is punished for the part he performs can make no difference. The crime could not be committed without the concurrent acts of both."

State V. Light, 21 Pac. 132.

The testimony of N. B. Nelson (Tr. p. 112) shows that he was hired by the United States Marshal to investigate gambling in the Town of Nome. The testimony of the United States Marshal, E. R. Jordan (Tr. p. 90), is to the effect that he employed Nelson "to go down town and look up any gambling and report to Mr. Holland at the office." Nelson testified that he played for five or six nights with the defendants before making any report; that the only reason he failed to make a report before the sixth night was that during the whole week there never was a game that he did not fear would break up if he left it to report to the Marshal. It seems from this testimony that there would have been no game had Nelson not been employed to ferret out gambling. It does not appear from the testimony of either Nelson or Jordan that Nelson was expected to participate in any game. He was employed to look up any gambling—not to gamble. He gambled with the defendants; he was arrested with them and was equally liable to prosecution with the rest of the defendants. The instructions of the court to the jury were to the effect that if the witness Nelson was employed by the United

States Marshal to engage in the apprehension of persons violating the law by gambling and that, in pursuance of such employment, the said Nelson engaged in a gambling game, that then the said Nelson was not an accomplice with the defendants. (See Assignment of Error No. XLII., (Tr. p. 196). The instruction goes on to state, however, that if the witness Nelson was not so employed by the United States Marshal and did not engage in the gambling game for the purpose of apprehending the defendants, he was an accomplice and his testimony should be treated as such. The lower court evidently concedes the rule to be that every participant in a gambling game is an accomplice of every other participant unless he be employed by the legal authorities to participate in the game, or at least to engage in the apprehension of persons violating the law by gambling.

But the evidence of Jordan, the United States Marshal, discloses that Jordan paid Nelson from his own private funds. Nelson was in no sense a government detective. There is no law in Alaska, nor anywhere else, which authorizes the United States Marshal or any other person to employ detectives to participate in the commission of crime with immunity from punishment on account of such employment. The lower court evidently relied on a class of cases which holds that detectives and informers who co-operate and actually engage in the commission of a crime for the purpose of ap-

prehending others, but without any criminal intent on their own part, are not subject to indictment and therefore not accomplices of their confederates. These cases all rest on the principle that such detectives and informers at no time have the criminal intent which is one of the necessary elements of the offense. For instance, a detective might join a gang of persons about to engage in a burglary, ally himself to them, and participate in the breaking into of a bank and blowing open a safe. Each of the other persons engaged would be guilty of the crime of burglary, because each had an intent to deprive the owner of the contents of the safe thereof. This element of crime certainly would be lacking in the detective, consequently he would not be punishable. To extend this principle to misdemeanors such as gambling is illogical. There is no intent involved in the crime of gambling except the intent to do the act. When a man sits in a poker game and buys chips for money, and bets, and wins or loses, he commits the crime of gambling. The fact that he has been employed so to do, even by a United States official, in his official capacity or otherwise, does not in any way relieve him from criminal responsibility. Such a consideration might influence prosecuting authorities to refrain from pressing a charge against him. We are of the opinion that both the authorities and their employee are equally guilty under such circumstance of the crime of gambling.

Nelson's testimony was the only testimony that connected any of the defendants with the commission of the crime charged. He was the only witness who swore that all sitting at the table were engaged in the game. He was the only witness who swore that the game was for money. Without his testimony there was not enough evidence, however suspicious the circumstances might be, to go to the jury. He was not only a participant in the game, but, according to his own testimony, was the main stay of the game. Without his presence there would have been no game. Under these circumstances, it seems to us that his testimony must certainly be regarded, under the authorities, as that of an accomplice. We find no well-reasoned cases to the contrary.

We therefore earnestly contend that the court erred in overruling the motion of the defendants for a directed verdict of acquittal.

In this connection, we call attention to this motion for a directed verdict as applied to defendant Laird. Both Laird and Johnson were convicted on the second count in the indictment. The second count charges the crime of gambling by playing a game of cards called "pangingui." There is no evidence in the case on the part of any witness which connects the defendant Laird with the game of "pangingui." The testimony of the deputy marshals was to the effect that the defendant Johnson was engaged in a game of "pangingui" and the de-

fendant Laird in a game of stud poker. The testimony of the witness Nelson was to the same effect. Nelson testified that he himself participated with Laird in a game of stud poker. No witness on the part of the prosecution testified that Laird at any time participated in the game of pangingui. The testimony of Phil Holland (Tr. pp. 66, 67) was to the effect that he took certain checks or chips from the pangingui table; that stamped on the chips were the words, "The Arctic good for 12½c in trade, A. C. Laird, Prop." On other of the chips were the words, "The Arctic, good for 25c in trade, A. L. Laird, Prop." This was the only evidence connecting even the name of Laird with the pangingui game. No evidence was offered to show that the defendant Laird was the proprietor of the Arctic or had caused his name, or any person's name, to be printed on any chips. He might or might not have been proprietor of the Arctic Billiard Hall. The name "Laird" in the chips were printed. It was not in the handwriting of defendant Laird. It seems to have been treated by the court as an admission by Laird that he was proprietor of the Arctic Billiard Hall. Even such a fact, if proven, would not make him a participant in a game of pangingui which he did not actually play. It certainly is not necessary to cite authorities to sustain the proposition that no person is bound by the fact that his name appears in print on any paper or other article. Consequently, there appears to be no evidence

whatever that the defendant Laird was guilty of the crime of which he was convicted. As far as the defendant Laird is concerned, the motion for a directed verdict should have been sustained for this, if no other, reason. It should have been sustained as to both defendants if the court holds the witness Nelson to have been an accomplice.

XI.

The 28th and 29th specifications of error relate to the error of the court in refusing to admit in evidence the record of the proceedings before the United States Commissioner which was offered for the purpose of proving former jeopardy. The legal propositions involved in these specifications have been discussed with reference to the first specification of error wherein the same question is involved in the motion to quash the indictment in the case.

XII.

The 30th specification of error relates to the error of the court in permitting improper comment to the jury by the United States Attorney upon the fact that the witness Charles Mason refused to testify with reference to certain matters connected with the crime charged in the indictment on the ground that he might criminate himself. The remarks complained of are set forth in full on page 139 of the transcript of record.

It will be remembered that Charles Mason was

one of the three witnesses on account of whose absence the United States District Attorney succeeded in obtaining so many continuances of the case. The purpose of the introduction of the stipulation referred to in the 24th specification of error is plainly revealed by the aforesaid comment of the United States Attorney with reference to the refusal of the witness Charles Mason to testify on the ground that he might criminate himself. That such comment was prejudicial error if unrebuked by the court is announced clearly in

Beach v. U. S. 46 Fed. 754.

as follows:

“The refusal of the witness to answer questions if he thought his answers would criminate himself was his constitutional right which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. Marks was called by the Government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or might have been the effect of his testimony, had it been given, was unwarranted. The intimation even that any such inference was justifiable, as plainly is to be drawn from the charge of the court, and its permission to allow the District Attorney to argue to that effect to the jury, was cal-

culated to work injustice to the defendant and to lead the jury to yield to the suggestions and suppositions rather than to the actual evidence in the case. It would, indeed, be strange doctrine that any one could be found guilty, or even that his guilt could be seriously debated, because another party, called as a witness, who had no relations and was not a conspirator with him, or charged in the same indictment, had refused to testify in order to protect himself. There is neither reason nor authority for and such doctrine."

XIII.

The 31st specification of error relates to an instruction of the court to the jury to the effect that a failure of the jury to follow the instructions of the court as to the law would be punishable as contempt of court. Such an instruction must necessarily constitute a coercion of the jury to adopt the view of the court as to the merits of the case, if they can be ascertained. The attitude of the court throughout the entire trial of the case must necessarily have impressed the jury as somewhat hostile to the defendants. It must be remembered that this was the second trial of the case; that the first jury had disagreed. The ordinary jury is unable to distinguish between the law and facts of a case with that degree of discernment of which lawyers are capable. In connection with the later instructions of the court, there is no doubt but what the instruction complained of was prejudicial. At a later stage

of the trial, after the jury had been deliberating for two days and reported that they were unable to agree upon a verdict, the court gave them an additional instruction, which contained the following statement:

“The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.”

Following this, the court admonished the jury to return to the jury room and read his instructions carefully, at the same time telling them that it was their duty to arrive at a verdict in the case according to the evidence and the instructions. Counsel for defendants excepted to such last mentioned instruction on the ground that it was an attempt to influence the jury to return a verdict against their consciences. These proceedings are set forth in full on page 159 of the transcript of record.

We cannot but remark that in our view, which is unchanged by the lapse of more than a year since the trial took place, it seems evident that the District Attorney, United States Marshal, and the Judge of the court were bending every effort to secure a conviction in this case, regardless of law or justice.

XIV

The 32nd specification of error relates to an instruction of the court with reference to the character of the witness N. B. Nelson as an accomplice or otherwise. The argument with reference to the

twenty-seventh specification of error is equally applicable to this instruction.

XV.

The 33rd specification of error is with reference to the instruction of the court to the effect that the value of the chips used in the game as printed on the chips themselves was sufficient evidence to establish their actual value. This is another attempt of the prosecution to bind the defendants by printed matter without any showing that they were responsible for the same. If the words "12½c in trade" printed on a poker chip or other article are sufficient evidence to establish the value of such chip at 12½c. then the words "one million dollars" so printed on a poker chip would likewise establish its value to that amount. As far as we have been able to ascertain, the only authority having power to establish value in this manner is the United States Government.

XVI.

In the 34th specification of error we complain of the court's instruction to the effect that the owner or lessee of a building or room cannot permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts transpiring in such building or room, and further, as follows:

"It follows, therefore, that if you find gambling was being carried on in the room

known as the Arctic Billiard room or parlor, and that said room was being held by defendant under a lease from the owner, then I instruct you that such defendant is guilty if he knew that such room was being used for the purpose of gambling, and a game of stud poker or panguingui played with cards for money or chips of value was had in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist."

There is no authority in law for such a proposition. Under a statute making it a crime to keep a disorderly house, the owner or lessee or person in control of such house kept in a disorderly manner is guilty of such keeping if he knew or permitted it to exist, under some of the authorities. Likewise, in jurisdictions where there is a statutory offense of keeping a gaming house, the owner or lessee or person in control of the premises is guilty of keeping a gaming house if he knowingly permits such gaming house to be kept. We have been unable to find a single authority, however, which holds that the owner of a building is responsible for a single act of gambling committed with his knowledge. There is no such offense in Alaska as keeping a gaming house. The defendants were not indicted for such an offense. The defendants might have been the lessees of the Arctic Billiard Parlor or of the building wherein it was situated. They might have had knowledge of the fact that various persons at various times engaged in gambling on

the premises. If there was such a law in Alaska, they might have been indictable under such circumstances for keeping a gaming house. There is no authority, however, to sustain the proposition that under such circumstances they were guilty, as principals, of participating in any particular game, as charged in the indictment.

XVII.

The 35th specification of error relates to an instruction of the court as to the knowledge of the owner or lessee of the room that gambling was being carried on there. The court permitted evidence of other acts of gambling to be introduced for the purpose of showing this guilty knowledge. There was no evidence in the case to the effect that any of the defendants were lessees of the room where the gambling was alleged to have been committed, as distinguished from the entire building. Their prior knowledge or present knowledge of the prevalence of gambling might have been very prejudicial in the minds of the jury, but in no way revelent to the crime charged in the indictment.

XVIII

The 37th specification of error relates to the refusal of the court to instruct the jury with reference to the weight of the testimony of an accomplice. The instruction requested, as set forth in the specification of error, is an exact quotation of Section 2262, Compiled Laws of Alaska. It is not cov-

ered by any of the other instructions of the court. Comment is unnecessary.

XIX.

The 38th and 39th specifications of error relate to the refusal of the court to instruct the jury with reference to the application of Section 2262, Compiled Laws of Alaska, to the case on trial.

XX.

The 40th specification of error relates to the refusal of the court to give the following instruction requested by the defendants:

“You are instructed that the testimony of an accomplice should be viewed with distrust.”

Paragraph 4 of Section 1505, Compiled Laws of Alaska, is as follows:

“4. That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution.”

XXI.

The 41st specification of error relates to the error of the court in refusing to instruct the jury to the effect that they were not to draw any inference prejudicial to the defendants on account of the refusal on the part of the witness Mason to answer certain questions which he refused to answer on the ground that his answers might tend to criminate him. This proposition is fully discussed in relation

to the 30th specification of error, and the authorities there cited in support thereof are again referred to.

XXII.

The 42nd specification of error involves the same legal proposition as the 30th and 41st specifications of error.

XXIII.

As to the 43rd specification of error relating to the refusal of the court to give a certain instruction with reference to the presumption of innocence, we are unable to find the equivalent thereof elsewhere in the court's instructions.

XXIV.

The 44th specification of error involves the same propositions of law as are fully discussed with reference to the 27th specification of error.

XXV.

As to the specification of error No. 45, we pointed out the vice of the instruction therein complained of in discussing the 31st specification of error, and it is unnecessary to repeat the same.

CONCLUSION

It is respectfully submitted that the record discloses the conduct of the trial in this case to have been distinguished by egregious errors, several extremely prejudicial, others of less importance; that

the defendants have not been accorded a fair trial.

We do not entirely disagree with the "Court's Remarks on Gambling Generally" which have been interpolated into the record (Tr. p. 29) without our fault or consent. The purpose of their insertion in the record is not apparent, unless it was hoped that the appellate court might be influenced by some other consideration than the merits of the legal problems presented.

To one reading the record, it would seem that the attitude of the court toward the crime of gambling generally found sufficient opportunity for expression during the trial, as manifested by its rulings, and that there was no necessity for the special ebullition after the jury retired. However, this may be, we respectfully assure this court that the community residing at Nome, Alaska, is no such hot-bed of vice that its suppression is justified by a judicial disregard of the forms of law, rules of evidence and safeguards with which the law surrounds persons accused of crime.

Respectfully submitted,

GEORGE B. GRIBSBY,

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Attorneys for Plaintiffs in Error.

No. 2891

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ED JOHNSON AND A. C. LAIRD

Plaintiffs in Error.

vs.

UNITED STATES,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court for the District of Alaska, Second Division.

F. M. SAXTON,
United States Attorney.

George B. Grigsby and Hugh O'Neill, Attorneys for
Plaintiffs in Error.

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IN THE
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ED JOHNSON AND A. C. LAIRD

Plaintiffs in Error.

VS.

UNITED STATES,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE.

On the night of January 5, 1916, Deputy U. S. Marshals Miller, Holland, Reed and Terrell raided the Arctic Billiard Parlors in Nome and arrested the plaintiffs in error, Ed Johnson and A. C. Laird and eight others, whom they apprehended in the act of gambling. At the time of the arrest some of these parties were en-

gaged in a "stud poker" game with said Laird, and the others were engaged in a game of "pangingui" with said Johnson. Thereafter the United States Attorney filed an information in the U. S. Commissioner's court for Cape Nome Precinct against all of said parties, including the plaintiffs in error, Johnson and Laird, charging them with gambling in two counts, and invoking the jurisdiction of the United States Commissioner as a committing magistrate. When the matter came on for a hearing before the U. S. Commissioner, sitting as a committing magistrate, counsel for plaintiffs in error sought to invoke the jurisdiction of the U. S. Commissioner as a justice of the peace; endeavoring to have the information in the Commissioner's court considered as a complaint in a justice's court and requested that plaintiffs in error be allowed to plead and demanded a jury trial. All of which was refused by the U. S. Commissioner. After having heard the testimony offered, said Commissioner held the plaintiffs in error and five others to await the action of the grand jury.

Thereafter, on the 6th day of April, 1916, the grand jury returned an indictment against the plaintiffs in error, Johnson and Laird, and five others, charging them with the crime of gambling in two counts. The first count charged the crime of playing "stud poker" and the second count charged "pangingui."

The first trial resulted in a "hung" jury, and the

second a verdict of "guilty" on the *first count* as to the plaintiffs in error and not guilty as to the other defendants therein. The verdict on the second count was "not guilty" as to all of the defendants therein.

The defendants, Johnson and Laird, plaintiffs in error herein, were each fined \$500.00 and the costs of the action. They have sued out a writ of error and have assigned fifty-six errors.

POINTS AND AUTHORITIES.

I.

A transcript of the record of the trial, although entitled and certified as a "bill of exceptions" does not constitute a bill of exceptions and will not be considered by the appellate court.

Compiled Laws of Alaska, section 1054.

McMahon vs. Duffy, 36 Or. 150, 152, par. 1.

Eaton vs. O. R. & N. Co., 22 Or. 477-502.

O'Connor vs. Van Hoy, 29 Or. 505, 511, par. 2.

Lincoln vs. Claflin, 7 Wallace 136.

II.

United States Commissioners in the District of Alaska, have the *power, as committing magistrates*, to hold "preliminary hearings" in misdemeanor cases and

to hold the defendants to await the action of the grand jury, whenever the United States Attorney in his discretion *invokes such power* by filing an information in the commissioner's court for his precinct charging such an offense.

Compiled Laws of Alaska, Sec. 2381.

U. S. vs. Folsom, 3 Alaska 226.

Compiled Laws of Alaska, Sec. 2379.

In Re Donnelly, 1 Pac. 783.

Compiled Laws of Alaska, Sec. 2583.

U. S. vs. Powers, 1 Alaska, 180, 187.

U. S. vs. John Sesnon Co., 3 Alaska 595.

III.

United States Commissioners in Alaska have the power as justices of the peace to *try* misdemeanors whenever a *complaint* is filed in the *Justice's court* for his precinct charging such an offense.

Compiled Laws of Alaska, Sec. 2520, 2521.

IV.

The action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review, unless it be clearly shown that such discretion has been abused.

Hardy vs. United States, 186 U. S. 224.

V.

Criminal *procedure* in Alaska is statutory. Hence, in the absence of statutory authority for the appointment of an elisor, the court is without authority to make such appointment.

Compiled Laws of Alaska, Sec. 2110.

30 Stat. L. 1253, Title and Enacting Clause.

Summers vs. U. S., 231 U. S. 92, 104.

Compiled Laws of Alaska, Sec. 2229.

State vs. Savage, 36 Or. 191, 201.

VI.

“That no challenge shall be made or allowed to the panel: A challenge is an objection to a particular juror, and may be either:

First, Peremptory or

Second, For cause.”

Sec. 2230 Comp. Laws of Alaska.

VII.

“But on the trial of such challenge (to a juror), although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court

must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."

Compiled Laws of Alaska, Sec. 2236.

State vs. Savage, 36 Or. 191, 202 par. 5.

Reynolds vs. U. S. 98 U. S. 145, 156.

Ex parte Spies et al, 123 U. S. 131.

VIII.

A challenge of a juror "for cause" without stating the particular grounds is insufficient.

Southern Pac. Co. vs. Rauh, 49 Fed. 696, 700.

24 Cyc., Page 336 and 337 and authorities cited in foot notes 99 and 5.

IX.

The ruling of the trial court will not be reviewed on appeal unless such ruling has compelled the defendant to accept an objectionable juror.

Ann. Cas. 1915 D. 98 note.

State vs. Thorne, 41 Utah 414, Ann. Cas. 1915 D. 90, 95.

Carter vs. State, 45 Texas Crim. Rep. 430.

McRae vs. State, 62 Fla. 74, 57 So. 348.

Cromer vs. Borders Coal Co., 152, Ill. App. 555.

State vs. Foster, 136 Iowa 527, 114 N. W. 36.

State vs. Addison, 134 La. 642, 64 So. 497.

Shunnway vs. State, 82 Neb. 152, 117 N. W. 407.

Colbert vs. Journal Pub. Co. (N. M.) 142 Pac.
146.

State vs. Sultan, 142 N. C. 569, 9 Ann. Cas. 310,
54 S. E. 841.

Colbert vs. State, 4 Okla. Crim. 500, 113, Pac.
558.

Darnell vs. State, 123 Tenn. 663, 134 S. W. 307.

King vs. State (Texas) 100 S. W. 387.

X.

Appellate courts will consider only the rulings on challenges to jurors who *actually sat at the trial*.

Ex parte Spies, 123 U. S. 131.

XI.

Where the proof is such that no other verdict save one of guilty is legally permissible, the courts will not reverse a case because of error in empaneling the jury.

Sullins vs. State, 79 Ark. 159, 9 Ann. Cas. 275.

State vs. Thorne, 41 Utah 414, Ann. Cas. 1915
D, 90, 96.

16 Ruling Case Law, Par. 106, p. 292.

XII.

"A witness is allowed to refresh his memory, respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing."

Compiled Laws of Alaska, Sec. 1497.

XIII.

"It is the right of the witness to be protected from insolent, insulting or improper questions, or from harsh or insulting demeanor."

Compiled Laws of Alaska, Sec. 1508.

XIV.

"A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of the times, places and persons present; and he shall be asked whether he has made such statements, and, if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them."

Compiled Laws of Alaska, Sec. 1502.

State vs. Crockett, 39 Or. 76.

State vs. Martin, 47 Or. 290.

State vs. Goodager (Or.) 106 Pac. 638, 639.

State vs. Steeves, 29 Or. 85, 101, par. 5.

XV.

A witness can not be impeached by proof of an inconsistent statement of an immaterial matter.

Vol. I Wharton's Criminal Evidence (10th Ed.)

Sec. 402, and cases cited in foot notes 1, 2, and 3.

XVI.

A grand juror can testify only to matters tending to impeach a witness by showing inconsistent statements of said witness before the grand jury.

Compiled Laws of Alaska, Sec. 2136.

XVII.

A detective is not an accomplice if he co-operates with the accused for the purpose of detecting him.

State vs. McKean, 36 Iowa 343, 345, 14 Am. Rep. 530.

People vs. Ballinger, 71 Cal. 17, 11 Pac. 799.

Wharton's Criminal Evidence (10th Ed.) page 923 and foot note 15.

Underhill on Criminal Evidence (Sec. ed.) Sec. 69, p. 120, and foot note 101.

XVIII.

It is only that part of the testimony of an accomplice *tending to connect the defendant with the crime* that needs to be corroborated.

Compiled Laws of Alaska, Sec. 2262.

XIX.

The owner or lessee of a building who knowingly permits it to be used as a gambling house is *particeps criminis* in such unlawful games.

Rosencrans vs. U. S. 155 Fed. 38, 47.

14 Cyc. 489.

XX.

A general exception to an instruction, which does not suggest or point out the defect complained of, so as to bring it distinctly to the court's attention, and afford an opportunity to remedy the defect complained of, if any exists, presents no question for review.

Compiled Laws of Alaska, Sec. 2274.

Ball vs. U. S., 147 Fed. 32, 43.

Cass Co. vs. Gibson, 107 Fed. 363, 367.

Shelp vs. United States, 81 Fed. 694, 700.

Columbus Const. Co. vs. Crane Co., 98 Fed. 945,
951.

Railroad Co. vs. Varnell, 98 U. S. 479, 483.

Mobile & Montgomery R. Co. vs. Jurey, 111 U.
S. 584, 596.

Newport News and Mississippi Valley Co. vs.
Pace, 158 U. S. 36, 40.

XXI.

The refusal to give instructions covered by the general charge is not error.

State vs. Megorden, 49 Or. 259, 269, par. 9.

State vs. McDaniel, 39 Or. 161, 184, par. 20.

State vs. Eggleston, 45 Or. 345, 360.

State vs. Gray, 46 Or. 24, 31, par. 5.

State vs. Smith, 47 Or. 485, 487.

XXII.

“That neither a departure from the form or mode prescribed by this act, in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid, unless it has actually

prejudiced the defendant, or tends to his prejudice in respect to a substantial right.”

Compiled Laws of Alaska, Sec. 2261.

XXIII.

“Unless it can be seen that prejudice has resulted from error of the trial court, prejudice will not be presumed.”

Hoogendorn vs. Daniel, 202 Fed. 431, 433.

Jackson vs. U. S., 102 Fed. 473, 477.

XXIV.

The refusal of a witness, who is a *particeps criminis* with defendants, to testify on the ground that his testimony would criminate him, is a circumstance which the jury may consider in determining the guilt or innocence of defendants.

Clementine vs. State, 14 Mo. 112, 115.

Sec. 2257 Comp. Laws of Alaska.

Central Stock and Grain Exchange vs. Board of Trade of City of Chicago, 196 Ill. 396, 63, N. E. 740, 744.

U. S. vs. Carter, 217 U. S. 286, 316, 317.

State vs. Barlette, 55 Me. 200, 217.

State vs. Cleaves, 59 Me. 298, 300.

Wigmore on Evidence, Vol. III, paragraph 2272
and notes, Vol. I, Par. 289.

Wharton's Criminal Evidence (10th Ed.) par.
478.

Diggs, Caminetti et al. vs. U. S., 242 U. S. 470,
492-495.

XXV.

The length of time for which a trial court will hold
a jury to deliberate upon their verdict is in the discretion
of the trial court.

Driver vs. State, 37 S. E. 400, 112 Ga. 229.

Gilbert vs. Com., 51 S. W. 590, 21 Ky. Law Rep.
115.

State vs. Rose, 44 S. W. 329, 142 Mo. 418.

Young vs. State, 26 Ohio Cir. Ct. R. 749.

Russell vs. State, 92 N. W. 751, 66 Neb. 497.

Jahnke vs. State, 94 N. W. 158, 68 Neb. 154.

Com. vs. Martin, 34 Pa. Sup. Ct. 457.

Wishard vs. State, 115 P. 796, 5 Okla. Cr. 610.

XXVI.

Sending a jury back for further deliberations upon
their verdict after they have reported that they cannot
agree is not an unusual proceeding and is within the
discretion of the trial court.

- Hyde vs. United States, 225 U. S. 347, 383.
 State vs. Olds, 76 N. W. 644, 160 Iowa 110,
 par. 5.
 Stage vs. Pierce, 37 S. W. 815, 136 Mo. 34.
 Wilson vs. State, 70 S. W. 57, 109 Tenn. 167.
 Muckelroy vs. State, 42 S. W. 383 Texas.
 Carlisle vs. State, 56 S. W. 365, Bill No. 3.
 Secor vs. State, 95 N. W. 942, 118 Wis. 621.
 People vs. Koerner, 102 N. Y. S. 93, 98.
 State vs. Powell, 56 S. E. 23, 75 S. C. 494,
 par. 5.
 Terry vs. State, 97 S. W. 1043.
 State vs. Richardson, 115 N. W. 220.
 State vs. Golliman, 60 S. E. 682.
 Territory vs. Donohue, 113 P. 601.
 Sandefer vs. Com., 137 S. W. 504, 143 Ky. 655.
 State vs. Clark, 135 P. 1083.
 Endleman vs. U. S., 86 Fed. 456.

ARGUMENT.

Before considering any of the errors assigned by the plaintiffs in error, we desire to direct the court's attention to the pretended bill of exceptions in this case. An inspection of such bill of exceptions will disclose that while it is entitled "Bill of Exceptions" and has the certificate of the trial judge to that effect, the 131 pages of matter contained therein constitute a transcript of the entire proceedings of the trial, including all of the evi-

dence, the objections thereto, the rulings of the court thereon and the exceptions taken thereto and some of the arguments of counsel, but no classification or statement of facts upon which the exceptions are based. Section 1054, Compiled Laws of Alaska, is the statute governing the form of a proper bill of exceptions in this jurisdiction, and the statute was taken verbatim from the Oregon statute, section 171 Lord's Oregon Laws. This section was construed by the Supreme Court of Oregon long before its adoption by Congress as a part of the Alaska Code, and therefore Congress adopted the construction that had previously been given this section by the Oregon Supreme Court. However, in the absence of such statute, the rule is the same.

On page 139 of the transcript containing said pretended bill of exceptions we find this statement:

“The foregoing is all of the testimony which was given and admitted on the trial of said case.”

Then follows the argument of counsel, the instructions of the court in *haec verba*, then a repetition of the instructions excepted to by counsel for plaintiffs and the exceptions thereto, followed by instructions requested by counsel for plaintiff in error and refused by the court, with the exceptions thereto, and lastly the verdict and judgment.

An almost identical bill of exceptions was considered

by the Supreme Court of Oregon in *Eaton vs. O. R. & N. Co.*, 22 Or. 497-502, Mr. Justice Bean speaking for the court, in which that court said:

“As appears from brief of counsel for appellant, the errors relied on here are, in overruling a motion for non-suit, in the admission of a certain letter in evidence, and the giving of a certain instruction to the jury. These assignments of error are claimed to be presented by what counsel terms a bill of exceptions, but which is nothing more or less than the whole testimony and proceedings of trial as it took place extended from the stenographer's notes. The testimony alone covers more than one hundred pages of typewritten matter, the large proportion of which has no relevancy or applicability to the question sought to be presented for our consideration. Scattered through this mass of testimony are the objections of counsel, the rulings of the court, and the exceptions taken thereto. The whole proceedings of the trial have been certified here as a bill of exceptions, and we are expected to labor through this voluminous record, segregate and classify it, and out of it to construct a bill of exceptions, and then determine whether the assignments of error are well taken. This practice is in utter disregard of the plain provision of the civil code, which requires that the exception should be stated with so much of the evidence or other matter as may be necessary to explain it, and no more (section 232); and has repeatedly received the disapproval of this court. In *State v. Murray*, 11 Or. 414, Mr. Justice Thayer,

speaking for the court, says: 'Such a practice is not only unlawyer-like, but it is an imposition upon the court. . . . It presents an unwieldly document, imposes a difficult labor upon the court, to search out and ascertain the points assigned as error, and creates an unnecessary expense. It is a shameful procedure, and the judges of the circuit court should interfere and put a stop to such kind of practice.' Again, in *Tucker v. S. F. M. Co.*, 15 Or. 584, the same judge in discussing a question sought to be raised by a bill of exceptions like the one in this case, said: 'Whether the evidence sent up here in what counsel are pleased to term a bill of exceptions, will warrant such a conclusion or not, I shall never know; for I never intend to look into it to ascertain whether such is the fact or not. If counsel desires a review of such questions, they must prepare a bill of exceptions as provided in the civil code of the state. They have no right to throw together in a mass all the testimony given in the case as taken down and extended by a shorthand reporter, as has been done in this case, and bring it here and require this court to examine it, and find its conclusions of fact therefrom. No such practice should be tolerated by an appellate tribunal in the proceeding to review errors of law. . . . Many questions of law may involve an examination of the testimony given in a case, such as the overruling of a motion for a non-suit; but ordinarily an exception requires a statement of a small portion of the evidence in order to explain it. But the fault here referred to is not that the objection constituting the exception

is stated with more of the evidence than is necessary to explain it—the fact is, it is not stated at all. The proceedings had at the trial, and the evidence taken, are marshaled and sent here for this court to examine and consider the various exceptions indicated therein.’ Further on he said: ‘The statute clearly intends that a statement of the exception shall be made up, settled, allowed, and signed by the judge, and filed with the clerk, and thereafter it is deemed and taken as a part of the record of the cause’ (Code, par. 230). No such labor-saving shift as that which seems to have been devised and adopted in this case can be countenanced. It would lead to so loose a practice that counsel could not know nor courts determine what questions were involved or were to be decided.’

In *Janeway v. Holston*, 19 Or. 98, Strahan, J., in speaking of a similar bill of exceptions, says: ‘The reporter’s notes contain ample material from which a bill of exceptions might have been constructed; but the wildest liberty in the use of language cannot torture this writing into one. Section 230, Hill’s Code, defines an exception, and section 231 points out the method of making the same a part of the record, so as to present a question for review in this court; and we have several times endeavored to point out the necessity of observing these provisions of the code in the preparation of a case on appeal. If these provisions of law be utterly disregarded, there is nothing presented which we can properly examine.’ And in *Fiore v. Ladd*, ante

202, the court, in speaking of the practice of making a part of the bill of exceptions all the evidence given on the trial when no questions are presented for review calling for an examination of the evidence, said: 'This practice is in disregard of the plain provisions of the statute (Hill's Code, par. 232), as well as all rules governing the preparation of bills of exceptions, is unnecessarily expensive to litigants, and imposes the arduous task upon this court of examining vast amount of irrelevant and immaterial matter.'

The provisions of our statute introduce no new rule in this matter, but are merely declaratory of the law as it already existed. In *Pennock v. Dialogue*, 2 Pet. 15, Mr. Justice Story condemns the irregularity, inconvenience and expense of putting the entire evidence of a case into the bill of exceptions, and expressed the regret of the court that such a practice should prevail. In *Zeller v. Eckert*, 4 How. 297, Mr. Justice Nelson said: 'This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice. Only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted, should be carried into the bill of exceptions. All beyond, serves only to encumber and confuse the record and to perplex and embarrass both court and counsel.' In *Johnston v. Jones*, 1 Black. 220, Mr. Justice Swayne, in speaking of this practice, said: 'The court desires to put on

record again its condemnation of this irregularity, and to express the hope that a better practice may prevail hereafter in all cases intended to be brought before this court for revision.' Again in *Lincoln v. Claflin*, 7 Wall. 136, Mr. Justice Field, in delivering the opinion of the court, used this language: 'A bill of exceptions should only present the rulings of the court upon some matter of law, as upon the admission or exclusion of evidence, and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearings of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill alleges that testimony was produced tending to prove. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some districts — quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned.'

The object of a bill of exceptions is to bring into the record the particular matter excepted to, and which the record would not otherwise disclose. It should, therefore, be drawn up concisely, but as explicitly as possible, with a view to stating all the

facts and circumstances necessary to the statement of the point of law intended to be raised. (State v. Drake, 11 Or. 396; Powers, App. Pro. 225; Green, Pleading & Practice, par. 1140.) The object is to present the naked legal question, and only such facts as are necessary to explain its relevancy to the particular case should be stated. With such a record, it is only necessary for this court to consider and determine the question of law presented, and not be compelled to labor through a voluminous record to ascertain the facts upon which the question is based, and having done so, to be met with a petition for rehearing, as is not infrequently the case, in which the legal conclusions are not controverted, but 'respectfully but earnestly insisting that the court is mistaken as to the facts.' If counsel desire the entire proceedings of the trial to be made a part of the record, there perhaps can be no objection; but ordinarily it should be attached to and made a part of the bill of exceptions as an exhibit, or in some other appropriate way, and not massed together, entitled a bill of exceptions, and certified here for us to examine, and ascertain whether the trial court erred. Cases may and often do arise in which it is necessary for this court to examine the evidence upon the entire case, or upon such particular point. In such cases the bill of exceptions must, of course, contain the evidence; but there should be embodied in it only the evidence bearing upon the particular point presented. We do not desire or intend to enforce any technical or refined rule in this matter; and when the question sought to be presented is

clearly stated and readily understood, we shall examine and decide it, although the record may contain much irrelevant and immaterial matter. But where, as in this case, the question of law depends entirely upon facts which are in dispute between counsel, we cannot be expected to examine the entire record of the trial, separate the material from the immaterial matter, and undertake to decide with whom the facts are. It was the duty of the counsel, in the preparation of the bill of exceptions, to have segregated the evidence, and brought here only such as is applicable to the point raised, and then we could have determined the question intelligently. If the practice adopted in this case is to prevail the statute becomes meaningless, and the office of a bill of exceptions entirely abrogated; and it is only necessary in all cases to embody in the record a copy of the stenographic report of the trial as and for a bill of exceptions. Such a labor saving process cannot receive the approval of this court."

In *O'Connor vs. Van Hoy*, 29 Or. 505, 511, paragraph 2, Mr. Justice Wolverton quoted with approval from section 809 of Elliott's Appellate Procedure, as follows:

"It is not enough to state exceptions in the bill. The facts on which the exception are based are quite as important as the exceptions. Where the facts are not stated there is nothing demanding consideration, for without them neither the character nor the influence of the ruling can be ascertained or

determined." See *Phoenix Life Insurance Company v. Raddin*, 130 U. S. 195 (7 Sup. St. 500); *Kelly v. Murphy*, 70 Cal. 562 (12 Pac. 467). And such is the case under the practice in this state; *State v. Clements*, 15 Or. 246 (14 Pac. 410). The objection to the bill of exceptions is not so much that the facts are not stated in the record, for it purports to contain all the facts of the trial, but that they are not so grouped and stated with reference to the exceptions as to show the nature and influence of the ruling upon which error is alleged. By reading the testimony of witnesses seratim, and noting the introduction of exhibits, etc., together with the objections, rulings and exceptions, the court might be able to predicate a pertinent assignment of error, but this counsel should do. This court has heretofore in like instances declined to thus ascertain for itself the question sought to be presented (*Hamilton v. Gordon*, 22 Or. 557, 30 Pac. 495), and we decline to do so in this case so far as the rulings upon the introduction of evidence are concerned."

Under the foregoing authorities we submit that the pretended bill of exceptions in this case is wholly insufficient to serve the purpose of a bill of exceptions and should be disregarded by this court.

ON THE MERITS.

In considering the errors assigned by the plaintiffs in error, we have numbered the paragraphs to corre-

spond to the paragraphs in the brief of plaintiffs in error treating the same subject. However, in our references to Assignments of Error, we have used the numbers by which such assignments are *designated in the transcript* and not the numbers by which such assignments are designated in their brief.

We have not considered it necessary to discuss the Assignments of Error waived by counsel for plaintiffs in error in their brief, to-wit: 1, 12, 13, 14, 15, 16, 17, 18, 32 and 39.

At the threshold of this argument we desire to emphasize the declaration of this Court in *Hoogendorn vs. Daniel*, 202 Fed. 431, 433, and *Jackson vs. United States*, 102 Fed. 473, 477, that:

"Unless it can be seen that prejudice has resulted from error of the trial court, prejudice will not be presumed."

This is the law for Alaska as announced by this Court and no argument in support of the reasonableness or justness of the same is required. Prejudice must be shown, it will not be presumed.

PARAGRAPH I.

(ASSIGNMENT OF ERROR No. II)

Counsel for the plaintiffs in error have sought by a motion to quash the indictment to raise the question as to the power of a United States Commissioner in Alaska to hold a defendant to await the action of the grand jury upon a charge accusing the defendant of a misdemeanor. It is quite evident that counsel have mistaken their remedy. A motion to quash certainly cannot question a proceeding further back than the actions of the grand jury returning the indictment. There is no connection between the proceedings by which one accused of a crime is held to await the action of a grand jury and the indictment returned by the grand jury.

As to whether or not the plaintiffs in error were or were not held to await the action of the grand jury is quite immaterial in this case, and it is equally immaterial whether the United States Commissioner acted with or without jurisdiction in so holding them. In no event can such a question be raised by attacking the indictment. The indictment is in no respect dependent upon what had previously occurred before the United States Commissioner. If the grand jury was regularly drawn and empaneled, and the indictment regularly returned in due form upon legal evidence, then such indictment is immune to an attack by a motion to quash

and any other matters are foreign to the purpose of such motion.

Counsel for plaintiffs in error claim that the proceedings before the United States Commissioner constituted a trial. If that be true, the remedy would be a plea of former jeopardy and not a motion to quash the indictment. That phase of the question will be discussed under the 37 and 38 assignments of error, paragraph XI, herein.

PARAGRAPH II.

(ASSIGNMENTS OF ERROR III TO VIII)

The second trial of this case was set for April 17, 1916, but upon the convening of court on that day the United States Attorney informed the Court that the United States Marshal had been unable to find three witnesses on behalf of the Government for whom he had subpoenas and that he could not proceed with the trial until such witnesses should be found. These witnesses were Charles Mason, A. Hanson and Elmer Adams, all present and engaged in the games for which plaintiffs in error were indicted. These witnesses had avoided the service of a subpoena by hiding during the first trial of this case, appeared in their accustomed haunts as soon as the taking of testimony closed, had disappeared as soon as the jury was discharged without reaching a ver-

dict, and the Marshal's force, after searching the town diligently, was unable to find them. These facts were all well known to the Court, but do not appear in the record. The Court was satisfied that the plaintiffs in error were responsible for the disappearance of these witnesses, but had no legal proof thereof. Under these conditions the Court postponed the trial practically from day to day from April 17 to April 26, being a total period of nine days and six successive postponements. At the end of that time the plaintiffs in error produced the witness, Chas. Mason, and stipulated as to the other two.

In *Hardy vs. United States*, 186 U. S. 224, we find this statement of the law as applicable to Alaska, to-wit:

“That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not a subject to review by the court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.”

There is no showing that this delay of nine days was in any way prejudicial to the plaintiffs in error, and the postponement was therefore a matter entirely within the discretion of the trial court.

PARAGRAPH III.

(ASSIGNMENT OF ERROR No. IX)

The basis of the ninth assignment of error is the denial of defendants' motion for the appointment of an elisor to serve the special venire. The only probative facts stated in the affidavit upon which the motion is based is that U. S. Marshal Jordan and some of his deputies were witnesses upon the former trial of said cause against the defendants. The statements of what somebody testified to on the former trial is in the nature of "hearsay" testimony and can have no probative force. On the argument of this motion counsel for defendants conceded that there was no personal animosity on the part of the Marshal (transcript, page 49) or his deputies against the defendants. Is the mere fact that the Marshal and some of his deputies are called as witnesses for the prosecution sufficient to establish his disqualification to perform the duties of the Marshal's office in connection with summoning the jury? Or if we go beyond the probative facts alleged in said affidavit and consider what some one testifies to on the former trial, what do we find in said testimony to disqualify the Marshal? He and his deputies, being well known, the only chance to detect gambling was to hire some one to act as a detective. His instructions to the detective were to find out where gambling was being carried on and report to his office; no instruction to go to defendant's place or

any particular place. The detective located gambling at the defendant's place, reported it to the Marshal's office at a time when the Marshal was in St. Michael, a hundred miles away, with the result that Deputies Miller, Holland, Reed and Terrell made the raid and caught the defendants in the act of gambling. Of course, these deputies were witnesses at the trial, giving in evidence the facts constituting the *res gestae* of the raid. The Marshal was likewise a witness to show his employment of the detective. Did any one of these officers go beyond his duty as such officer? The deputies arrested the defendants when they caught them in the criminal act. The Marshal showed a higher conception of his official duties than many men have done when he was willing to pay some one else to perform a duty of his office which he could not do himself by reason of the nature of that duty. Is it possible that the statute has made the duties of the Marshal so inconsistent that if he performs his duty in the enforcement of the law against gambling that he disqualifies himself to perform his statutory duty in serving a special venire to try the violators of the gambling laws?

And this leads to an inquiry as to what is the Marshal's duty in reference to serving a special venire in any case.

The procedure in criminal cases in Alaska is statutory. This is manifest from the very first section of

the Code of Criminal Procedure (Section 2110 Compiled Laws of Alaska, 30 St. L., page 1285), which says:

“That proceedings for the punishment and prevention of the crimes defined in Title XIV of this act shall be conducted in the manner herein provided.”

The same intent is further manifest by the title to said act, which is (30 St. L. 1253):

“An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district.”

and the enacting clause thereto, which reads:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows:”

In *Summers vs. U. S.*, 231 U. S. 92, 98, 104, it was determined that our procedure was controlled by the law of this Territory rather than the Federal law governing procedure in U. S. Courts. This principle is settled by that case. Mr. Justice McKenna wrote the opinion, and in discussing the Alaska Criminal Code and Code of Criminal Procedure, says on page 101 of said opinion:

“The Alaska Code is quite an elaborate code of substantive and adjective law, the former containing twelve chapters of definitions of offenses against the person and property, the public safety and the public peace, the other containing elaborate and circumstantial provisions for the indictment and trial of offenders, their sentence and punishment, and a provision for appellate review. It seems to omit nothing of circumstances or detail necessary to a careful and advanced procedure.”

On page 102 of said opinion:

“In the latter case (referring to *Clinton vs. Englebrecht*, 13 Wall. 434, 445), it was said: ‘That the whole subject matter of jurors in the Territories is committed to territorial regulation.’ ”

And again, on page 104 of said opinion:

“It covers every step in criminal proceeding, the first accusation, arrest, preliminary inquiry of guilt, duties of officers and magistrates, formation of grand juries, the indictment, trial and its conduct, verdict, sentence and judgment.”

Section 2228, Compiled Laws of Alaska, applies only to the summoning of jurors on the “regular panel,” but the following section 2229 is the law governing in this case. It reads:

“The trial jury shall be formed as follows: When the action is called for trial the clerk shall

draw from the trial jury box of the court, one by one, the ballots containing the names containing the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is completed, the Marshal, under the direction of the court, shall summons from the bystanders or the body of the district so many qualified persons as may be necessary to complete the jury."

This section prescribes the procedure in case there are not enough names in the trial-jury box to complete the jury, and there is no provision for the appointment of an elisor. The provision is that the *Marshal* shall summons such additional persons as may be required to complete the jury.

Under this statute the court was without power to appoint an elisor if the Marshal had been disqualified.

Section 2229 of the Compiled Laws of Alaska was evidently taken from the Oregon Code with slight modifications (Section 180, Hill's Code, 116 Lord's Oregon Laws). In *State vs. Savage*, 36 Or. 191, 201, the question was raised as to the power of the trial court to appoint an elisor under conditions not provided by statute, but that case was decided without determining that question. However, the comments of the court upon the facts under the *assumption* that the trial court had such power, are pertinent in this case. The court said, speaking through Mr. Justice Moore:

“Assuming, without deciding, that the authority of the court to appoint such person is clear, and that the obligation to do so is imperative, was such power evaded or duty violated in the present instance? The solution of this problem must depend upon whether the sheriff was interested in the result of the action. The mere expression of an opinion, from the facts before him, as to the defendant’s guilt, did not necessarily render him interested in the result of the action, or disqualify him from selecting talesmen: *People v. Shuler*, 28 Cal. 490. In *Friery v. People*, 2 Abb. Dec. 215, a jury having been empaneled, the accused submitted a challenge to the array, the first ground of which was that the sheriff or summoning officer had formed or expressed an opinion as to the guilt or innocence of the prisoner. Mr. Justice Wright, in commenting upon this question, says: ‘Plainly, the first ground of challenge was without substance. The idea that the mere expression of an opinion by the officer designated by law to summons jurors as to the merits of a case that may chance to be on a calendar of a court for trial, or in respect to the guilt or innocence of a party under indictment, is matter for challenge to the array, is as absurd as it is novel.’ The sheriff is the chief executive officer and conservator of the peace of the county: *Hill’s Ann. Laws*, par. 999. It is thus incumbent upon him, within the boundaries of his county, to render to the prosecuting officers all the assistance reasonably in his power to suppress crime and to punish criminals; and, if he entertains the opinion that a person sus-

pected or charged with the commission of an offense is really guilty, his conscience furnishes a justification for the effort he puts forth in the performance of his duty. The sheriff says he received, as a reward, all the compensation he demanded or expected for securing the money feloniously taken, and denies that he was to receive, or that he expected to secure, any sum whatever in the event of the defendant's conviction. The sheriff's interest in the result of the action was thus in issue, and the court, by overruling the motion to appoint an elisor, in effect determined the question in his favor. The evidence upon this issue is made a part of the transcript, an examination of which, in the light of the decision thereon, fails to convince us that any error was committed in allowing the sheriff to select the talesmen."

Applying the above rule, was the marshal disqualified? It is admitted that he held no animosity against the plaintiffs in error, his testimony as a witness was confined to his employment of the detective (Bill of Exceptions, page 90 of Transcript), and the only evidence of any interest in the case whatever is the fact that he employed the detective to look up gambling in the town and report to his office. He had no interest in the result of this trial, except the interest that every good citizen feels in the enforcement of the law. That could not disqualify him. He had no financial interest in the result of the trial. His obligation to pay the detective was in no way dependent upon the result of

the trial and had been satisfied long before the trial occurred. In the Oregon case the sheriff received a reward for apprehending the defendants and the court held that he was not thereby disqualified. In this case the marshal hires the detective and directs him to hunt up gambling without knowing who would be detected. That occurred nearly four months before the trial and was a closed incident at the time of this trial so far as the financial obligation was concerned. Hence, at the time of the trial, the marshal was not interested in any way in the result of the trial, other than the interest common to all good citizens.

In discussing a somewhat similar case the Supreme Court of Pennsylvania, said (*Clark vs. Com.* 123 Pa. St. 555, 573):

“If the sheriff had been an eye witness of the crime and had arrested the perpetrator on view of it, he would have discharged a plain duty and no disqualification would have resulted from his knowledge or his action upon it.”

The marshal's deputies in the case at bar, having entered the Arctic Billiard Parlors, discovered the plaintiffs in error in the act of committing a crime. They arrested the plaintiffs in error as was their duty in such case under the statute; later they were required by the government to appear and testify as witnesses against plaintiffs in error as to what occurred at the time of the

arrest. The law compelled them to do so. Hence, in so far as counsel for plaintiffs in error base their motion for the appointment of an elisor upon the fact that some of the marshal's deputies were witnesses upon the former trial, they are taking the position that because these deputies arrested the plaintiffs in error while committing a crime in the view of such officers, such deputies thereby disqualified themselves to summons such special venire. In other words by performing one statutory duty, they disqualify themselves to perform another duty imposed by the same statute. We insist that the Alaska statute prescribing the duties of the marshal and his deputies is not so inconsistent as counsel's position would demand.

Again, section 2230, Compiled Laws of Alaska, abolishes a challenge to the panel or array, and defines a challenge such as is permissible under the code as an objection to a particular juror. What is the purpose of this abolition of a challenge to the panel or array if not to limit the parties to the action to the examination of individual jurors in determining the qualifications of jurors? It is reasonable to conclude that Congress, by leaving out of the Alaska Code any provision for the summoning of a special jury by any person other than the marshall and by enacting said section 2230, intended to deny to litigants the privilege of questioning the manner of summoning such jurors.

Counsel for plaintiffs in error, cite *Koontz vs. State*,

10 Okla. 553, Ann. Cas. 1916 A 689, and Harjo vs. U. S. 98 Pac. 1021, both Oklahoma cases, in their argument upon this point, but they fail to point out the fact that Oklahoma has a statute providing that an officer is disqualified to summons a special venire by any *bias* that would disqualify him to act as a juror in such case. There are many of the states which have a similar statutory provision including California and North Dakota. It follows that in such states a summoning officer may be disqualified to summons a special venire by being a witness for the prosecution or by having formed or expressed an opinion of the guilt of the defendant, but such cases have no persuasive force in jurisdictions *where no such statute exists*.

Counsel likewise cite the Editor's note appended to Koontz vs. State in Ann. Cas. 1916 A. 693, an examination of which will disclose a statutory provision as the basis for disqualifying summoning officers of special venires in every case in which the basis of the ruling is disclosed. Said note cites several decisions opposed to counsel's contention and none supporting it, to-wit:

Com. vs. Pasco, 39 Pa. Super. Ct. 163.

State vs. Hayes, 23 S. D. 596, 122 N. W. 652.

Sullivan vs. State, 75 Wis. 650, 44 N. W. 647.

Mabry vs. State, 50 Ark. 492, 85 S. W. 823.

We contend, therefore, that the marshal was not dis-

qualified, and if he had been, the trial court was without authority to appoint an elisor. The court has such power in Alaska only in civil cases for the purpose of serving the summons. (See section 877, Compiled Laws of Alaska.)

And again there is no claim that the plaintiffs in error were prejudiced by the marshal in the summoning of the jurors of the special venire. It is true that counsel for defendants offered to exercise a fourth peremptory challenge but in so doing counsel stated that he made the offer by reason of the court's refusal to sustain counsel's challenge for cause to juror Pearson, and further in making said offer counsel did not designate which juror he desired to challenge peremptorily, and therefore we can not say whether it was one of the *original panel* or one of the *special venire*, whom counsel wished to excuse. In speaking of the action of the sheriff in summoning the jurors on a *special venire* in re State vs. Casedy (Oregon) 115 Pac. 287, 291 par. 5, Mr. Justice Burnette said:

"We must presume that his official duty was regularly performed. The end to be obtained is an impartial jury, and this is finally determined by the examination of the men themselves under the sanction of the court at the trial of the cause."

For these reasons the error, if any, was harmless.

PARAGRAPH IV.

(Assignment of Error No. X and XI.)

The examination of W. H. Pearson on his *voir dire* is long (Bill of Ex. pages 51 to 62 of transcript) and some of his answers are more or less inconsistent. It is apparent, we think, that he did not make the nice distinctions in reference to the burden of proof and presumption of innocence that a lawyer would make. His examination discloses that he had never sat on a jury in a criminal case; that he had an opinion based upon the general reputation of some of the defendants; that his opinion was fixed but that he could and would lay it aside and try the case fairly and impartially upon the evidence produced upon the trial under the instructions of the court. He says in one place (page 59 of transcript) that he does not think that he would be satisfied to be tried by a juror of his frame of mind if he was one of the defendants, and that he does not think it would be fair to be tried by a jury in his frame of mind, but in the next three questions counsel for plaintiffs in error repeat in effect the same questions and elicit decidedly opposite answers. He says that if every juror had his opinion and would go according to the evidence he would call that a fair trial. And when the question is repeated to him for the third time, he says that he would be satisfied to be tried by a jury with his opinion if he could prove that he was innocent. He is then

asked if the defendant should be required to prove that he was innocent, and he answers no and says that he is not in a frame of mind that would require the defendants to do so. It is evident that he was either confused in his answers or that he means that he would be satisfied to be tried by a jury of his own frame of mind if *he was innocent* but not if he was guilty. An innocent defendant wants only fair jurors, but a guilty defendant does not want fair jurors. The hope of the guilty defendant lies in the *unfairness* of the jurors. Hence, if Mr. Pearson were in defendant's position he would want a fair jury, if he were innocent. He says if he could prove himself innocent, which to him evidently means the same thing, because he says (near bottom of page 59 of transcript) that the burden was not upon the defendant to prove himself innocent and that he would not require the defendant to do so. The Court knew Mr. Pearson well and knew him to represent the very highest type of American citizenship. The Court questioned him (page 56 of transcript) as to his ability to give the defendants a fair and impartial trial, and being satisfied from his examination and from his appearance, manner, tone, and character as exhibited under examination that the juror was qualified, denied the challenge, whereupon the defendants, plaintiffs in error herein, peremptorily excused the juror.

The law governing challenges to jurors in criminal cases in Alaska is found in sections 2232, 2234, 2236,

2240, 2241, 2273 and 2274 of the Compiled Laws of Alaska and was taken practically verbatim from the statutes of Oregon, being sections 183, 185, 187, 192, 193, 230 and 231 of Hill's Code, or sections 119, 121, 123, 128, 129, 169 and 170 of Lord's Oregon Laws. The opinion of the Oregon Supreme Court, therefore, is pertinent in considering the ruling of the trial court upon the challenge to the venireman, Pearson.

In *State vs. Savage*, 36 Or. 191, 202, paragraph 5, that court had under consideration an identical case, which will appear from that part of said decision here quoted:

“John Adams, having been selected as a juror by Sheriff Driver upon a special venire, said upon his voir dire examination that he had read in the *Daily Chronicle* an account of the defendant's preliminary examination, had heard the matter very freely discussed, and had talked about the case; that as to the guilt or innocence of the defendant he had a pretty well settled opinion which it would require evidence to remove; and in answer to the question, ‘You feel that you would not be a fair and impartial juror?’ he said, ‘No, I do not think I would.’ On cross-examination, however, he said he did not think that the paper purported to publish the questions propounded to the witnesses, nor the answers which they gave; that such newspaper report could not be taken nor relied upon at the trial as sworn testimony, against which it would have no weight; that,

if accepted as a juror, he would base his verdict entirely upon the testimony given at the trial; and in answer to the question, 'Would you have any trouble in laying the newspaper report aside, and basing your verdict on the sworn testimony?' he said, 'No.' The court having overruled the challenge for cause, accepted the juror, and the defendant excepted. Our statute provides that on a trial of a challenge for bias, if it should appear that the juror challenged has formed or expressed an opinion upon the merits of the case, from what he has heard or read, such opinion is not sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror can not disregard such opinion and try the issue impartially: Hill's Ann. Laws, par. 187. In the trial of a challenge for actual bias, the court below, having heard the testimony of the juror, and noted his manner and bearing while under examination, is much better able to judge of his power to disregard any opinion he may have formed or expressed from what he has read or heard than is an appellate court from an inspection of the transcript containing the questions propounded and the answers thereto. It may be that, not desiring to serve as a juror, he will, as far as possible, seek to magnify his preconceived opinion, hoping thereby to escape the duty which the law enjoins upon him; but having said that he can lay aside such opinion and try the case impartially, and the court being vested with discretion in such cases, its decision will not be reviewed, except for a manifest abuse thereof; State vs. Saunders, 14 Or. 300 (12 Pac. 441);

Kumli vs. Southern Pac. Co. 21 Or. 505 (28 Pac. 637) ; State vs. Brown, 28 Or. 147 (41 Pac. 1042) ; State vs. Kelly, 28 Or. 225 (52 Am. St. Rep. 777, 42 Pac. 217) ; State vs. Steeves, 25 Or. 85, (43 Pac. 947) ; State v. Olberman, 33 Or. 556 (55 Pac. 866). Not being able to discover any abuse of such discretion, the action of the trial court in accepting said juror will not be disturbed.

We submit that the ruling of the trial court upon the qualification of venire-man, Pearson, should not be disturbed.

Again, the ground of challenge to said Pearson is "for cause." (Transcript, page 54).

Section 2274 of the Compiled Laws of Alaska provides:

"That the point of the exception shall be particularly stated"

In Southern Pac. Co. vs. Rauh, 49 Fed. 696, this court had under consideration an identical ground of challenge to a venireman under the Oregon statute, from which the Alaska statute was taken. Mr. Justice Morrow wrote the opinion of this court in that case and at page 700 of said opinion used this language:

"There is still another reason why the ruling of the court upon the challenge to the juror can not be disturbed. The challenge was for cause, without

further statement or explanation as to the particular ground of challenge. This is not sufficient. The ground of the challenge must be specifically stated. This is the requirement of section 231 of the Oregon Code of Civil Procedure providing that 'the point of the exception shall be particularly stated.' "

The ground of challenge was therefore insufficient and for that reason the ruling of the trial court in overruling said challenge was a proper exercise of his judicial discretion.

After the jury was completed but before it was sworn, counsel for plaintiffs in error made the following offer:

"At this time in view of the court overruling my challenge to the juror Pearson, the defense offers to exercise another peremptory."

This offer was denied by the court. Was this offer sufficient? It would seem that the offer should have designated the particular juror against whom the peremptory would be exercised. "A peremptory challenge is an *objection to a juror* for which no reason need be given, but upon which the court shall exclude him," Compiled laws of Alaska, Sec. 2231.

The transcript, pages 50-63, discloses that all jurors who sat on the trial of this case were "passed for cause."

Hence it can not be claimed that an objectionable juror was forced upon the plaintiffs in error by reason of the trial court's ruling upon venireman Pearson. It may be admitted that plaintiffs in error exercised all of their peremptory challenges, but it does not follow therefrom that the trial jurors were not each and all perfectly satisfactory to plaintiffs in error. It will not be assumed that a ruling was prejudicial, it must affirmatively so appear. Is the offer of counsel for plaintiffs in error to exercise another peremptory any evidence that there was an objectionable juror on the jury? Particularly, when the objectionable juror, if any, is not pointed out, and the reason assigned is not that there is an objectionable juror remaining on the jury but that the court had previously overruled the challenge to "juror Pearson." The reason assigned is not a reason, but a *pretense* only. It discloses not only the want of an objection to any juror remaining on the jury but also the evident purpose of *creating* the ground for a review by this court of the ruling of the trial court on the challenge to juror Pearson.

We say *create* because it must be apparent that no real objection to any member of the trial jury existed on the part of plaintiffs in error.

As authority for our statement that it must appear that some objectionable juror was retained upon the

jury, we quote from Thompson on Trials (2nd Ed.), Section 115:

“Some courts, therefore, hold that it is enough in such juncture, to show that his peremptory challenges were exhausted before the jury was sworn. But others take what seems to be the better view, that it must also appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place in the jury, who otherwise would have been excluded by a peremptory challenge.”

This “*better view*” is supported by the great weight of authorities and is ably advocated by the Supreme Court of Utah in *re State vs. Thorne*, Ann. Cas. 1915 D, 90, 95, where an exhaustive note will be found giving the decisions pro and con and where it is said in the opinion:

“The whole question of whether there is prejudicial error turns on whether prejudice will be presumed from the mere fact that the appellant was compelled to exercise one of his peremptory challenges to remove a juror whom he had challenged for cause, and who should have been removed upon the latter challenge, or whether in order to show prejudicial error, the appellant must make it appear that an objectionable juror was forced upon him after his peremptory challenges were exhausted, as aforesaid. If prejudice is presumed, it must be based upon the mere fact that

the appellant was required to remove a juror by the exercise of one of his peremptory challenges, when the juror should have been removed upon the challenge for cause. To follow such a course is to lose sight of the fact that all that one who is on trial for a crime is entitled to is a fair and impartial jury, and that the right of challenge is given for the sole purpose of reaching that result. This is illustrated in one way by the fact that a defendant may and often does waive one or more of his peremptory challenges. He does so whenever he is satisfied with the jurors in the box, or is not certain that he can obtain others more favorable to his cause. This may occur when he has exercised his last challenge just as well as when he has exercised his sixth, tenth or twelfth challenge. The mere fact, therefore, that one on trial for a crime was compelled to challenge a juror peremptorily, when such juror should have been removed for cause, cannot give rise to a presumption that an objectionable juror was subsequently placed on the jury in the place of the one that was challenged."

"In this case there was but one juror to be selected when appellants last peremptory challenge had been exercised. To the person who was called as the twelfth juror, there was no objection for cause or otherwise. If appellant had any personal or other objections to the juror, he should have indicated it then and there. True, counsel says that the *voir dire* examinations of the last juror disclosed no cause for challenge, and, in view

that the court had previously announced that appellants peremptory challenges had been exhausted, counsel had no alternative save to accept the juror. But if the last juror was a fair and impartial juror, and one against whom there was no objection, how was appellant prejudiced? If there was any reason why the twelfth juror was not impartial, or if appellant had discovered any reason why any one or more of the eleven jurors that had already been passed and accepted by him were unfair, he should have made the fact apparent to the court, and should have stated the grounds of his objections. It cannot be doubted that the court, in its discretion could have removed any objectionable and unfair juror at any time before the jury was finally sworn to try the cause, notwithstanding the fact that all of appellants peremptory challenges had been exhausted. Is it not clear that the situation so far as prejudicing the appellant is concerned is precisely the same as though he had waived his last peremptory challenge? As the matter now stands the record discloses that the appellant was tried by a fair and impartial jury, and that he at no time objected to any one of them, or intimated that he was forced to accept an objectionable juror after he had exhausted his peremptory challenges. Under the circumstances disclosed by this record, there is, therefore, absolutely nothing upon which to base a presumption of prejudice, even though we were inclined to adopt the rule that in such cases prejudice will be presumed, which we are not. We think that the only safe and rational rule is the one set

forth in the quotation from Thompson and Meriam, *supra*."

It becomes pertinent therefore to inquire, *what is an objectionable juror?* We find a lucid answer in Carter vs. State, 45 Texas Crim. Rep. 430, 432, 433, in a very similar case to the case at bar in which the court says:

"The state has made a motion for a re-hearing, and contends that the court is in error in the original opinion in regard to the formation of the jury which tried appellant. We held that the jurors Foster, Barlow and Floeck were not qualified jurors because they had not paid their poll-tax; and we further held that inasmuch as appellant was forced to challenge these jurors, and so exhausted his peremptory challenges, the court erred in forcing the juror McNeal on appellant, on his objection urged to said juror. On the first proposition we adhere to our original holding. Our attention was not specially drawn to the shape in which this bill presented the question as to the juror McNeal. Appellant assigned no cause or objection as to this juror; simply objected to him. So far as this record is concerned, as shown by this bill, McNeal was a qualified juror and no fact or circumstance was shown, as to him, which suggested that he was not absolutely fair and impartial. In the motion for re-hearing our attention is drawn to the fact that appellant simply objected to this juror without stating any ground of objection or any circumstance which rendered him an unfair or partial juror; and

a long line of authorities is cited in support of the proposition, beginning with Loggin's case, 12 Texas Crim. App. 65, and coming down to the present time, to the effect that, before a case will be reversed because of some improper action of the court overruling a challenge to a particular juror, it must be shown appellant exhausted his challenges, and that some objectionable juror was thereafter forced upon defendant. In Hudson's case, 28 Texas Crim. App. 323, an objectionable juror was said to be one against whom some cause for challenge exists, such as would likely affect his competency, or his impartiality during the trial; and these authorities are reconcilable with Keaton vs. State, 40 Texas Crim. Rep. 139, for there at least three jurors who had formed opinions, and as to whom it was proposed to prove the opinions so formed were against the appellant, sat in the case over his objection. This is what we understand to be meant by an objectionable juror; that is, one against whom some ground or cause, such as the formation of an opinion, or some prejudice, which might be ground of challenge, and would tend to show that the juror was not absolutely fair and impartial. But in this particular case no such ground was assigned. The juror was merely objected to. Upon such showing, we hold, in accordance with the unbroken line of authority, that the court did not commit any error in the formation of said jury, and in refusing to stand the juror McNeal aside, no ground of objection being urged as to him which

suggested that he was not a fair and impartial juror."

There is not one word in the record in the case at bar that would indicate that any one of the jurors who tried the case was objectionable in any respect to the plaintiffs in error. No expression even suggesting an objection to any of them was ever made. Not a man remained on the said jury to whom plaintiffs in error objected. In what way, then, have they shown prejudice? If any juror had been unfair or partial, that would have been developed in their voir dire examinations and shown by the record. But the opposite is shown, and in the face of this record, certainly this court will not indulge in a *presumption* of *prejudice*. Particularly since no *presumptions* of prejudice are indulged in on appeals from Alaska.

In *Hayes vs. Missouri*, 120 U. S. 71, it was said:

"The right to challenge is the right to eject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained."

This statement was approved in *Ex parte Spies*, 123 U. S. 131, after which it is said:

"We are therefore confined in this case to the rulings on the challenges to the jurors who actually sat at the trial."

There is another principle of law to which we now desire to direct the attention of the court, although it is alike pertinent to the subject discussed in Paragraph III herein, to-wit:

That an appellate court will not reverse a case on appeal for an error in the selection of a jury where the evidence discloses that no other verdict than guilty could have been legally returned. We direct the attention of this court to the authorities cited under Points and Authorities XI herein and quote from *State vs. Thorne*, *supra*, as follows:

“In addition to the foregoing, we remark that we have carefully examined the whole evidence preserved in the bill of exceptions, and there is absolutely no dispute nor conflict with regard to any fact relating to appellant’s guilt. That the appellant shot and killed the deceased, and that he did so for the purpose of and while perpetrating robbery is established beyond all possible question of a doubt. Indeed, no juror could have rendered a verdict other than guilty without violating his oath. As was said in *Sullins vs. State*, 79 Ark. 127, 95 S. W. 159, 9 Ann. Cas. 275, where the proof is such that no other verdict save one of guilty is legally permissible, courts will not reverse a case because some complaint is made against a juror or some of the jurors.”

The record contains all of the evidence in the case at

bar and we invite the attention of the court to the same. Not a word of the material evidence in the case is disputed or denied by the defense or any attempt made to dispute or deny the same. The verdict was the lightest possible under the evidence, consistent with the oath of the jurors. Can this court say under the evidence that a jury had a legal right to return any other than a verdict of guilty? If not, any error that may have been made in selecting the jury is not prejudicial and does not constitute a legal reason for a reversal of this case.

PARAGRAPH V.

(ASSIGNMENT OF ERROR NO. XIX.)

This assignment is based upon the exclusion of certain immaterial and irrelevant matters by the court *sua sponti*. We question the good faith of this assignment. Counsel disclose their purpose in their claim that the answers of the witness disclose a hostility to the plaintiffs in error. Now the facts are that the witness and attorney O'Neill are *persona non grata* to each other. The manner of counsel toward the witness was just as hostile as the manner of the witness toward counsel. In fact the hostility was mutual. After it had proceeded as indicated, the court stopped it of its own motion.

PARAGRAPH VI.

(ASSIGNMENT OF ERROR NO. XX.)

The alleged gambling took place on January 5, 1916. It was shown by city patrolman, Wm. Dougherty, that in October previous, the defendant, Ed Johnson, had stated in his presence that he, Johnson, intended to gamble. The court admitted this testimony over the objection, that such statement was too remote, by counsel for defendants in said trial, and overruled a motion to strike it out, based on the same reason. On cross examination witness said that Johnson told him that that (gambling) was his way of making a living (page 95 of transcript). By instruction No. 9, this testimony was restricted in its application to the defendant, Johnson. His statement was in the nature of an admission against his interest and was certainly admissible for that purpose.

PARAGRAPH VI CONTINUED.

(ASSIGNMENT OF ERROR NO. XXI.)

Over the objection of counsel for plaintiffs in error the court permitted the witness, N. B. Nelson, to testify that he reported to deputy marshal, Holland, that there was gambling down at the Arctic Billiard Hall and he could get them and then he (witness) went back and

got into the game. This was only preliminary and had already been testified to in effect by deputy marshal, Holland (page 72 of transcript) without objection thereto.

PARAGRAPH VI CONTINUED.

(ASSIGNMENT OF ERROR No. XX.)

A leading question was asked the witness, Nelson, by the U. S. Attorney for the purpose of identifying one of the defendants (neither of the plaintiffs in error), which was permitted by the court over the objections of counsel for plaintiffs in error. Under section 1496 of Compiled Laws of Alaska leading questions are permissible in the sound discretion of the court. Otherwise, the error, if any, is harmless, as the defendant so pointed out was acquitted by the jury.

PARAGRAPH VI CONTINUED.

(ASSIGNMENTS OF ERROR Nos. XXIII, XXIV AND XXV.)

These assignments of error pertain to other occasions on which gambling had been carried on at the same place. United States Attorney stated to the court (transcript,

page 99) that this testimony should be confined to the owner and proprietor of the building. And by instruction No. 8, such testimony was restricted to the purpose of establishing knowledge upon the part of the owner and lessee of said building that gambling was being carried on there. For this purpose this evidence was unquestionably relevant. Mr. Wharton, in his work on criminal evidence (10th edition), section 35, says:

“Evidence of collateral offenses often become relevant where it is necessary to prove *scienter*, or guilty knowledge, even though the reception of such evidence might establish a different and independent offense.”

PARAGRAPH VI CONTINUED.

(ASSIGNMENTS OF ERROR No. XXVI, XXVII
AND XXVIII.)

Under section 1508 of the Compiled Laws of Alaska:

“It is the right of the witness to be protected from irrelevant, insulting, or improper questions, or from harsh or insulting demeanor.”

The trial court acted timely and properly in protecting the witness, Nelson, from the epithets of “stool-pidgioning” and “gum-shoeing.”

PARAGRAPH VII.

(ASSIGNMENTS OF ERROR No. XXIX, XXX
AND XXXI.)

On the cross examination of the witness, Nelson, by counsel for the defendants (plaintiffs in error herein) he was asked certain questions concerning what he had sworn to at the former trial. The United States Attorney objected to the questions for the reason that the testimony of the witness at the former trial had been reduced to writing and signed by the witness, and that such writing must be exhibited to the witness before questioning him as to the substance of his former testimony. Whereupon the following colloquy occurred (page 106 et seq. of transcript):

“MR. GRIGSBY: I have a right to call his attention to any former statements made by him at any time or place which may be inconsistent with his present testimony. It has no reference to any written document. I may want to use that paper to impeach him and it would destroy our purpose to let him read it over and fortify himself against my questions. The statements were oral, they were not in writing, the District Attorney had them transcribed afterwards.

MR. SAXTON: If the court please, that section there was taken from the Oregon law. The purpose of this question is certainly to lay a founda-

tion for impeaching the witness, otherwise it has no purpose at all.

MR. GRIGSBY: Certainly that is the purpose of it.

* * * * *

MR. SAXTON: Was your testimony at the former trial transcribed, and have you read and signed it?

THE WITNESS: I have.

MR. SAXTON: And you found it correct?

THE WITNESS: Yes sir."

Whereupon, the court refused to permit counsel for defendants to interrogate the witness as to his statements in his former testimony without first exhibiting to the witness such testimony. Counsel for defendants complied with the ruling of the court and so exhibited the testimony to the witness, but assigns the ruling of the court as error. Was not his compliance with the ruling of the court a waiver of his exception? Be that as it may, the ruling of the court was correct.

Section 1502 of the Compiled Laws of Alaska provides:

“A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them.”

This section was taken from the Oregon statute, being section 864 of Lord's Oregon Laws or section 841 of Hill's Code, and was adopted by Congress as a part of the Alaskan Code on June 6, 1900. Prior to this date, this section had been construed by the Oregon Supreme Court in *State vs. Stevens*, 29 Or. 85, 101, par. 5, in an opinion by Mr. Justice Moore in which he says:

“It is admitted that the court at the trial of Kelley on this indictment refused to permit his alleged statements to be given in evidence, for the reason that they had not been voluntarily made, and that they were admitted in this case for the purpose of contradicting Kelly only. It is manifest that these statements were made in the presence of the chief of police and others, and, being reduced to writing, were signed by Kelly, but they were not shown to him before he was interrogated concerning them, as required by the provisions of section

841, Hill's Code of Oregon. The reason assigned for not showing the writing to Kelly when called as a witness, as we gather it from the record, is that the statements were orally made by him to others before being reduced to writing, and therefore it was unnecessary to exhibit it to him. Kelly made the alleged confession for the purpose of having it written by the District Attorney, and the statements therein contained must have been orally made before being written; but when he signed the confession he adopted the language there used, and made it his own as much so as if he had personally written it. This being so, by what authority could Kelly be interrogated as to the contents of the writing until it was shown to him? The object sought by the statutory requirements, as we view it, is to refresh the memory of the witness, and, his statements being in writing, that end could be best attained by submitting the manuscript to him for inspection. The fact that the statements were made in the presence of others before being written can not change this rule, otherwise the writing could be wholly disregarded, and evidence of the oral statements as remembered by the person who heard them could be substituted therefor. Oral statements intended to be reduced to writing, when committed to paper and signed by the person making them, are supplanted, and must of necessity be excluded, by the writing, and, even if the writing in this case could have been admitted for any purpose, it was error to interrogate Kelly concerning the statements therein without having first shown it to him:

People vs. Nonella, 99 Cal. 333 (33 Pac. 1097);
 People vs. Ching Hing Chang, 74 Cal. 389 (16
 Pac. 201)."

Again in State vs. Crockett, 39 Or. 76, paragraph 1, Mr. Chief Justice Bean cites the foregoing opinion with approval and says:

"Upon the trial, Earl Crockett and Ella Anderson were called as witnesses, and gave evidence on behalf of the state. On cross examination they were asked if they did not make certain statements when testifying before the coroner's jury. Thereafter the defense, without showing the witnesses the testimony given by them at the coroner's inquest, which had been reduced to writing, offered it in evidence for the purpose of impeaching them, but the trial court refused to admit it. The deposition or testimony of a witness given before a coroner is *prima facie* evidence of what the witness swore to, and, when the proper foundation is laid, is admissible for the purpose of contradicting him: People vs. Devine, 44 Cal. 452. But, where it is sought to impeach a witness by written statements, they must be shown to him before any question is put to him concerning them: Hill's Ann. Laws, par. 841. And this rule applies to testimony in a judicial proceeding, reduced to writing and subscribed by the witness: State vs. Stevens, 29 Or. 85, 102 (43 Pac. 947); People vs. Ching Hing Chang, 74 Cal. 389 (16 Pac. 201); Simmons vs. State, 32 Fla. 387 (13 South 890); State vs. O'Brien, 18 Mont. 1 (43

Pac. 1091, 44 Pac. 399). It was not complied with in the case at bar, and hence there was no error in refusing to admit the testimony so offered.

Section 3380 of the civil code of Montana is identical with the statutes of Oregon and Alaska. In *State vs. O'Brien*, 43 Pac. 1091, 1093, Mr. Justice Hunt construes the statute in reference to the cross examination of a witness about the testimony of the coroner's inquest, which had been reduced to writing and signed by the witness, without first exhibiting the testimony to such witness. He held the same to be material error requiring a reversal of the case. After quoting the above section of the Montana statute he says:

"No authorities are needed further than the statute itself. It is but the expression of the reason of judicial decisions for years and years. By disregarding its requirements, well established principles of the law of cross examination were violated."

PARAGRAPH VIII.

(ASSIGNMENT OF ERROR NO. XXXIII.)

The stipulation whose admission is the basis of this assignment of error, particularly stipulates in express terms that it may be considered in evidence and read to the jury. No one can question the power of counsel

for the defendants in the trial below to enter into such a stipulation nor to bind their clients thereby. Can counsel now be heard to base an assignment of error upon a ruling of the trial court in conformity with their express stipulation? That would hardly be consistent with fair practice.

Again, is the stipulation immaterial? It at least accounts to the jury for the absence of witness Hanson and Adams whom the testimony had shown to have been present and engaged in the alleged gambling games. We deem it particularly potential in another respect but that will be considered later.

PARAGRAPH IX.

(ASSIGNMENTS OF ERROR NO. XXXIV AND XXXV.)

Counsel for plaintiffs in error attempted to impeach the witness, Nelson, by showing inconsistent statements of an immaterial matter. On the objection and motion of United States Attorney, the court ruled such testimony out. This ruling is assigned as error. The rule seems to be well settled that a witness can not be impeached by proof of contradictory statements of an immaterial matter. Wharton's Criminal Evidence (10th Edition), Section 482 states the rule thus:

“A witness called by the opposing party can be

impeached by proving that on a former occasion he made a statement inconsistent with his statement made on trial, provided such statement is material to the issue; but where a witness has testified as to incriminating facts, he can not be asked whether or not he had previously stated that, in his opinion, the defendant was not guilty, for the purpose of impeachment, as a witness can not be impeached on an immaterial matter. The statement upon which it is intended to contradict must involve facts in evidence, and the varying statements sought to be shown must be relevant to the issue."

PARAGRAPH X.

(ASSIGNMENT OF ERROR No. XXXVI.)

The motion to direct a verdict of not guilty was properly overruled. The question of whether or not the detective was an accomplice with the defendants was submitted to the jury which was as favorable to the defendants as the evidence would warrant. However, every element of the offense was proven by competent evidence bearing out the testimony of the detective, Nelson. Witnesses, Miller and Holland, testified to every element of the offense, except the value of the chips played for. And the printing on the chips themselves showed their value "in trade."

Again, the only element of a crime concerning which

the testimony of an accomplice must be corroborated is *connecting the defendant with the crime*. The corroborating evidence was ample on that element.

PARAGRAPH XI.

(ASSIGNMENT OF ERROR NO. XXXVII.)

In support of their plea of "former jeopardy," the defendants at the trial offered in evidence a certified copy of the transcript of the proceedings in the United States Commissioner's Court for Cape Nome Precinct in which said defendants were held to await the action of the grand jury, upon the theory, we suppose, that said transcript discloses a *trial* of the said defendants in the *justice's court* instead of a *preliminary hearing* in the *Commissioner's Court*. The court sustained the objection of the United States Attorney to the testimony, and such ruling is assigned as error. It must be apparent to any one examining said transcript that nothing in the nature of a *trial* occurred. The question was raised persistently by counsel for the defendants therein by offering to plead "not guilty" and by demanding a jury trial, but the Commissioner just as persistently refused to do anything of the kind, holding (transcript 130, 131):

"That the court was, under the information filed in this case, sitting in the capacity of a U. S. Com-

missioner as committing magistrate and not as ex-officio Justice of the Peace with jurisdiction and power to try and determine the case."

Said transcript discloses that the proceeding was initiated by the filing of an *information*, not a *complaint*; that said information was filed in the *Commissioner's court*, not in the *justice's court*; that the commissioner acted as a committing magistrate and followed the procedure as such; that the commissioner refused to allow the defendants to plead and declined to follow any of the procedure of a *trial* in the *justice's court*; and that the judgment rendered was that of a *committing magistrate* and not that of a *justice of the peace*. By what school of logic then do counsel for plaintiffs in error claim that the defendants in the court below were *tried* in the *justice's court*? The proceeding was not initiated in the *justice's court*, the defendants never appeared in the *justice's court*, and no proceedings were at any time had or taken in the *justice's court*. Counsel for plaintiffs in error might contend that the proceedings should have been initiated and conducted in the *justice's court* but there is no ground for the contention that *such was done*. The said transcript discloses the contrary and was therefore properly excluded by the trial court. It *disproved* "*former jeopardy*" instead of tending to prove it.

Counsel for plaintiffs in error have cited *Brown vs. State* (Ala.), 16 So. 929, as decisive of this point; but

one quotation at page 930 of the opinion in that case shows how inapplicable it is to the case at bar, to-wit (*Italics ours*) :

“It was beyond the power and jurisdiction of the justice, *after trial had*, to merge the several petit larcenies, to make one grand larceny out of them, *as he attempted to do*, and bind the defendant over for that offense.”

It is evident from this quotation that proceedings were *initiated in the justice court* and a *trial had* and then the justice determined to change to a *preliminary hearing*. As already pointed out, nothing of the kind happened in the case at bar.

Counsel for plaintiffs in error may contend that the commissioner was without jurisdiction to act as a committing magistrate in case of a misdemeanor, but that is beside the question. What the commissioner may have done *extra jurisdictionally* is no proof that he did something else as a *justice of the peace*. But was the commissioner without jurisdiction to act as a committing magistrate in this matter?

It will be conceded that the District Court and Justice's Court in Alaska have concurrent jurisdiction to try all misdemeanors, punishable by fine or imprisonment in jail, including gambling, and that neither has exclusive jurisdiction in such cases (see sections 363 and

2519 of the Compiled Laws of Alaska). There are, therefore, two courts open for the trial of misdemeanors in Alaska. Who has the *option* of choosing the forum? The plaintiff or the defendant? When the defendant is brought into one of these courts can he be heard to say: "I prefer to be tried in the other?" Both reason and practice say no; the plaintiff chooses the forum, and so long as he chooses a forum which has jurisdiction, the defendant can not be heard to complain.

Now, when the United States Attorney decides to prosecute some one for a misdemeanor in Alaska he not only has two forums from which to choose, but he has at least three different methods of procedure from which to select the one he may determine to follow: (1) He may file a *complaint* in the *justice's court* under section 2521 et seq. Compiled Laws of Alaska, and try the case either before the justice or a jury subject to appeal by defendant to District Court. (2) He may wait until the grand jury is in session and initiate the proceedings before the grand jury, and by this method secure an indictment in the District Court under section 2123 of the Compiled Laws of Alaska. (3) He may elect to file an *information* before the United States Commissioner or District Judge invoking his jurisdiction as a *committing magistrate* under sections 2379 and 2383, Compiled Laws of Alaska, and upon a preliminary hearing before said magistrate, have the defendants held to the District Court, as was done in the case at bar.

There are only two classes of officers empowered to act as committing magistrates in Alaska, to-wit: District Judges and U. S. Commissioners (see section 2381, Compiled Laws of Alaska).

A United States Commissioner in Alaska is a very composite official. He is not only a fully empowered United States Commissioner with the additional duties of a committing magistrate and coroner thrust upon him (Sections 366, 2381 and 2473, Compiled Laws of Alaska), but he is *ex-officio* justice of the peace, recorder and probate judge. His powers and duties as a commissioner are just as distinct from his powers and duties as a justice of the peace, recorder or probate judge, as they would be if each of these offices were held by a different official. A commissioner is empowered to do certain things as such among which is the power to act as a committing magistrate; certain other things as a justice of the peace among which is to try defendants charged with certain misdemeanors and certain other duties as probate judge or recorder. In order to invoke his powers as a commissioner, magistrate or coroner, proper proceedings must be instituted and conducted in the commissioner's court; but if it is desired to invoke his powers as a justice of the peace or probate judge the proper proceeding must be initiated and conducted in the justice court or the probate court for that particular precinct. Hence a proceeding initiated in a commissioner's court is in a

different and distinct forum from one initiated in a justice's court, although the same individual presides over both courts. Therefore, in this case when the United States Attorney filed the information in the commissioner's court, such proceeding was in a forum that has no power *to try anybody for anything*. The jurisdiction of the commissioner as a magistrate was invoked and exercised and that jurisdiction only. The commissioner as such has no power *to try* cases; he can only hold to the District Court. No proceedings were ever initiated or had in the *Justice's Court* in this case, and as that is the only court outside of the District Court in which a *trial* could have been had, the defense of "former jeopardy" must fail.

By reason of the logic as well as the eminence as a jurist thereafter attained by the writer, we desire to quote from the dissenting opinion of Mr. Justice Brewer in *ex parte Donnelly*, 1 Pac. 783:

"It is conceded that the district court has concurrent jurisdiction with justices of the peace of the offense charged against the petitioners and that the state has a right to elect in which tribunal it will prosecute. It is a general truth that where two tribunals have concurrent jurisdiction the plaintiff may elect in which he will prosecute, and choose for himself any mode of proceeding authorized by law, statute or common. In neither civil nor criminal cases is the tribunal or form of action selected by the

defendant; nor in case one tribunal has jurisdiction, and one form of action is authorized, can the defendant object on the ground that another tribunal has also jurisdiction, and that in a different form of action the litigation may be determined with less expense and in a shorter time. This, which is a general truth applicable to all actions, ought to be especially enforced where the state is the plaintiff and the action a criminal one. The state ought not to be hampered; it should have the privilege of going before any tribunal which has jurisdiction, and resorting to any mode of procedure which is authorized by statute * * * yet I am still constrained to think that a preliminary examination before a justice of the peace in cases of misdemeanor is authorized. By the code of criminal procedure paragraphs 2 and 3, all violations of law for which punishment is prescribed, are defined as public offenses and divided into the two classes of felony and misdemeanor. Article 5 of that Code provides for the arrest and examination of offenders. It authorizes the filing of a complaint before certain magistrates, the arrest of the party, his examination before the magistrate, and his commitment for trial at the court where he is to be tried. This article does not speak of felonies alone, but uses the general term 'offenses.' It does not commit such examinations to justices of the peace alone, but names, specifically, mayors, police magistrates, judges of the district and supreme courts. The fact that examination may be had before any other than justices of the peace, is also recognized by section 69. Sup-

posing a complaint for a misdemeanor were filed before a judge of the district court, can he hear the complaint? and if so, what must he do? He certainly has no power of final trial. The statute authorizes the filing of a complaint before him, and I know of no reason why he may not entertain jurisdiction; but his jurisdiction would be limited to a preliminary examination, and the binding the defendant over for trial at his court. The same jurisdiction in the matter of preliminary examination, and by the same section of the statute, is given to justices of the peace. Does the fact that they also have jurisdiction to try, oust them of jurisdiction to examine? I can not see the logic of that argument, nor can I see why, when the same section grants jurisdiction in preliminary examinations to judges of the district court and the justices of the peace, and a defendant brought before the former must submit to a preliminary examination, he can when brought before the latter, compel the justice to give up his jurisdiction in the matter of preliminary examination, and assume jurisdiction to try. It must be remembered, as I have already stated, that this Code of Criminal Procedure is the General Code. It is devoted specifically to matters of procedure, and therefore, in matters of procedure, should overpower any mere implications or inferences drawn from the language of other statutes. The same argument by which the jurisdiction of district courts in misdemeanors is sustainable,—that is the continuous and especially controlling operation of the statute concerning district courts in

all cases not at the time specifically excepted therefrom—seems to me to sustain the jurisdiction of justices of the peace in matters of preliminary examination for misdemeanors. This Code of Criminal Procedure is continuous, controlling in all cases in which at the time there is no special statutory exception. Its language is general, and it is to be given a general application.”

In their brief counsel attempt to break the force of *U. S. vs. Folsom*, 3 Alaska 226, by saying that that prosecution was under a “special statute,” to-wit, Section 2583, Compiled Laws of Alaska. Now, said Section 2583, was enacted as a part of the Act of Congress constituting the Criminal Code and Code of Criminal Procedure, such Act being entitled:

“An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district” (30 St. L. 1253).

Said section 2583 prescribes a method of procedure under “*this Act*.” To what do the words, “*this Act*” refer? Unquestionably to the act of which said section constitutes a part. If so, the procedure prescribed by said section applies to every misdemeanor defined by the criminal code of Alaska, because the said criminal code constitutes a part of “*this Act*.”

We submit the United States Commissioner in Alas-

ka has jurisdiction to act as committing magistrates in cases of misdemeanors.

(ASSIGNMENT OF ERROR NO. XXXVIII.)

This offer was in the nature of a “josh,” although that element of it is not apparent from the record. The “same objection” was made and upon looking back through the record it will be discovered the previous objection was “incompetent, immaterial, and irrelevant.” The objection that should have been made is that *it was not the best evidence*. However, the rule of evidence is that a general objection, *if sustained*, is sufficient if there is *any* ground upon which the evidence might have been excluded. (See Wigmore on Evidence, Vol. 1, Section 18, page 59.)

“So, too, a specific objection *sustained* (like a general objection) is sufficient, though naming an untenable ground, if some other tenable one existed.” (See Wigmore on Evidence, Vol. 1, Sec. 18, p. 61.)

PARAGRAPH XII.

(ASSIGNMENT OF ERROR NO. XL.)

This assignment will be discussed in connection with the LI assignment of errors in paragraph XXI herein.

PARAGRAPH XIII.

(ASSIGNMENT OF ERROR NO. XLI.)

This assignment of error is based upon the giving of a part of instruction number 4. The exception is general and is therefore ineffective if there is any legal proposition therein correctly stated. There are at least three legal propositions in that part of said instruction excepted to, to-wit:

- (1) "it is the duty of the judge of the court to instruct you upon the law applicable to the case.
- (2) the statute makes it your duty to accept as law what is laid down by the court as such in these instructions and
- (3) if you should knowingly refuse to do so you would be liable as for contempt of court."

Is there one of these three propositions that is unobjectionable? If so, no error can be predicated thereon. Section 2266, Compiled Laws of Alaska, *inter alia*, provides:

"That although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound nevertheless, to receive as law what is laid down as such by the court;"

And, again, the *seventh* subdivision of section 2246 of the Compiled Laws of Alaska:

“The court, after the argument is concluded, shall immediately, and before proceeding with other business, charge the jury;”

These excerpts from the Alaska Code of Criminal Procedure are sufficient upon this alleged error.

PARAGRAPH XIV.

(ASSIGNMENT OF ERROR No. XLII.)

This assignment is based upon a general objection to instruction No. 5 $\frac{1}{2}$ given by the court upon the trial. This is a long instruction, containing over four hundred words and may be subdivided into as many as a dozen legal propositions. What has been said in reference to Assignment of Error No. XLI. applies with equal force here. A general exception brings nothing before this court for review. As was said by Mr. Justice Gilbert in *Ball vs. United States*, 147 Fed. 32, 43:

“It (the exception) was directed to an entire paragraph, portions of which were not subject to objection, and it did not point out the defective portion, so as to bring it to the attention of the court, and thus afford an opportunity to remedy it. Such an exception will not be considered in an appellate court.”

PARAGRAPH XV.

(ASSIGNMENT OF ERROR NO. XLIII.)

The chips referred to in instruction 5 $\frac{1}{2}$ A are described on page 43 of the bill of exceptions and constitute "Plaintiff's Exhibit B." These chips are circular pieces of card board about 1 $\frac{1}{2}$ inches in diameter and $\frac{1}{8}$ inch in thickness, on which there was printed according to the color of the chip as follows:

On the white chips, "The Arctic, good for 12 $\frac{1}{2}$ c in trade, A. C. Laird, Prop."

On the blue chips, "The Arctic, good for 50c in trade, A. C. Laird, Prop."

On the red chips, "The Arctic, good for \$1.00 in trade, A. C. Laird, Prop."

This instruction is excepted to on the ground that witness, N. B. Nelson, gave testimony in conflict with the statement in the instruction as to the value of these chips. Such testimony is found on pages 97 and 111 of the transcript. The chips were one dollar a stack. Five cents a piece for the white ones and 25c a piece for the red ones. But this is the *cash* price, what the witness and others paid for them in cash. The printing on the chips states the value *in trade*, and it is not contradicted by one word of the evidence either directly or indirectly anywhere in the record. The value *in cash* of

these chips is one thing, and the value *in trade* is another. There isn't even anything unusual about the fact that these chips should have a greater value *in trade* than *in cash*. One does not in any way contradict the other. The court, by this instruction, called the attention of the jury to this uncontradicted printed statement on these chips, in the nature of a written admission. The testimony of the witness Dean (transcript, page 84) shows that plaintiff in error Laird was the proprietor of the Arctic Billiard Hall and cigar store.

PARAGRAPH XVI.

(ASSIGNMENT OF ERROR No. XLIV.)

The exception to instruction No. 7 is general and is therefore insufficient. The instruction is long and contains at least four legal propositions. As to whether or not any of the propositions is without objections is answered by the authorities cited under Points and Authorities XX herein.

PARAGRAPH XVII.

(ASSIGNMENT OF ERROR No. XLV.)

Instruction No. 8 restricts the evidence of gambling at other times at the same place to the purpose of showing "scienter" on the part of the owner and lessee. The

exception is general. The testimony showed the plaintiff in error Johnson, was the owner of the building (transcript, page 93).

PARAGRAPH XVII CONTINUED.

(ASSIGNMENT OF ERROR NO. XLVI.)

The same may be said of this assignment as of the last above. Instruction No. 9 restricted the admission of the defendant, Ed Johnson, to him, and advised the jury that such admissions *should not be considered* in determining the guilt or innocence of any of the other defendants.

The exception was general.

PARAGRAPH XVIII.

(ASSIGNMENT OF ERROR NO. XLVII.)

This assignment of error is based on the refusal of the trial court to give the following instruction requested by defendants, to-wit:

“You are instructed that a conviction can not be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendants with the commission of the crime, and the corroboration is not sufficient if

it is merely shown the commission of the crime or the circumstances of the commission."

This instruction was covered by instruction No. 51½, given by the court. It is a well established proposition of law that it is not error to refuse to give an instruction requested which is substantially covered by the general charge of the trial court. See authorities cited under Points and Authorities No. XXI.

PARAGRAPH XIX.

(ASSIGNMENT OF ERROR NO. XLVIII.)

This instruction was substantially given in instruction No. 51½.

PARAGRAPH XIX CONTINUED.

(ASSIGNMENT OF ERROR NO. XLIX.)

The instruction requested is objected to by reason of it misstating the charge in the indictment or rather by stating a part of the charge in a misleading way. It begins by saying:

"The indictment in this case charged the defendants with having played certain games of cards for money at the time and place charged in the indictment."

What the indictment actually charged is that the

games were played "*for money, checks, and chips as representatives of value.*" The difference is made of the greater importance by reason of the fact that the evidence showed that the games were played for chips as representatives of value, there being no proof or attempt to prove that the game was played for money.

And again the last proposition in said instruction, to-wit:

"if you should find from the evidence that the witness, N. B. Nelson, was an accomplice and there is no other testimony in the case than his tending to prove that gambling actually took place, then it will be your duty to acquit the defendants."

is submitted to the jury upon the condition that there is no other evidence than that of N. B. Nelson that gambling actually took place. This ignores the testimony of A. B. Miller and Phil Holland and the chips constituting the government's exhibits B and D and the printed statement of the value thereof thereon. The remainder of the instruction requested was given substantially in instruction No. 51½.

PARAGRAPH XX.

(ASSIGNMENT OF ERROR No. L.)

This instruction was given by the court and is the second instruction numbered 6 (page 146, transcript).

PARAGRAPH XXI.

(ASSIGNMENT OF ERROR No. LI.)

This assignment is based upon the refusal of the court to give an instruction to the jury to the effect that they should not draw any inference prejudicial to the defendants from the refusal of Chas. Mason to testify on the constitutional ground of incriminating himself. The fortieth assignment may be considered in connection with the fifty-first. The witness was first called by the Government and refused to testify. Afterwards he was called by the defendants (plaintiff in error) and his testimony ruled out by the court. The offer as to what he would testify to did not include any explanation of the evidence connecting him with the game. He was an accomplice with the defendants. Undisputed evidence showed the witness to have been engaged in the game of pangingui at the time of the raid. He was arrested with the defendants but at the hearing he was not bound over to the grand jury. He was therefore a competent witness but refused to testify when called by the prosecution. Because the witness refused to testify, the inference that he was engaged in the game of pangingui is a legitimate inference. We may concede that it may not be proper to infer that the plaintiff in error were guilty because the witness had availed himself of his constitutional privilege to refuse to testify and thereby affirm or deny whether or not witness had been engaged

in a game of pangingui. We might even concede that such refusal by the witness would not justify the inference that plaintiffs in error were engaged in such game. The natural and proper inference is that the *witness* was so engaged. The jury is forbidden by statute (Sec. 2258 Compiled Laws of Alaska) to draw an inference against a *defendant* by reason of *defendant's* failure to testify, but there is no such statutory protection given a *witness*. "The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in this act" (Sec. 2257, Compiled Laws of Alaska). As stated above, there is *no statute* forbidding the natural and logical inference to be deduced from the refusal of a witness, who is an accomplice with the defendant to testify. Suppose this were a civil action against the defendants for the recovery of money lost at gambling, could it be maintained that the defendant's refusal to testify would not be a proper fact for the jury to consider, in determining whether or not gambling was going on at the time and place alleged? In such a case it would even be the duty of the court to instruct the jury:

"Sixth. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore,

Seventh. That if the weaker and less satis-

factory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be received with distrust." (Sec. 1505, Compiled Laws of Alaska.)

A defendant would not be compelled to give testimony incriminating himself in a civil case any more than in a criminal case. The protection of the constitution is equal in both cases. However, the protection stops there in the civil case, while in the criminal the statute throws another safeguard around the defendant by declaring that *the waiver of his right to be a witness in his own behalf shall create no presumption against him*. This latter protection does not extend to witnesses who are accomplices and who are not on trial. There is no analogy in this matter between a defendant in a criminal action and a witness in the same case. Such defendant is protected by *statutory* safeguards which such witness does not possess. If any analogy exists it is between a defendant in a civil action and an accomplice who is a witness in a criminal action. Both may avail themselves of the statutory privilege to refuse to give incriminating testimony but such refusal is a circumstance proper for the consideration of the jury.

What did the refusal of the witness, Mason, tend to prove? He was asked if he was present and engaged in a game of pangingui with defendants, Johnson et al, at the time and place alleged in the indictment. The

question could have been answered either "yes" or "no." If he had answered "no" there could have been no criminal liability, but if he had answered "yes," he would have been liable to a subsequent criminal prosecution. He refused to answer on the ground that his answer would incriminate him. The reasoning mind can draw but one conclusion: The witness was present and so engaged.

Why is this not a legitimate inference? There is no statute forbidding it and in the absence of statutory prohibition, the rules of evidence in civil actions apply. See authorities cited under Points and Authorities No. XXIV.

The evidence discloses that defendants, Johnson and Laird, were the owner and proprietor, respectively, of the Arctic Billiard Parlor, the place where the alleged gambling took place. As such owner and proprietor they became responsible for any gambling occurring therein with their knowledge. Hence, the inference that Mason was engaged in the game of panguingui in question was not necessarily an inference that defendants were engaged in said game but merely an inference constituting a link in the chain of evidence making defendants responsible for the game. If Mason was engaged in said game, defendants, Johnson and Laird, became liable when their knowledge was shown by other undisputed evidence.

Mason admitted that he was arrested with the defendants, refused to testify whether or not he was engaged at that time in gambling in a game of pangingui; other witnesses testified that he was so engaged; United States Attorney, in his argument to the jury, directed the attention of the jury to Mason's presence at the time of the alleged game and his refusal to testify, and the ground of his refusal, believing that the inference to be drawn therefrom was legitimate as well as irresistible, but alas, how frequently we misjudge the working of a juror's mind. The jury was not convinced, and after forty-odd hours of deliberation they determined that the alleged game of pangingui was a myth; that Mason's fears of incriminating himself were groundless, and that the comments of the U. S. Attorney upon Mason's refusal to testify were ineffectual; in fine, the jury returned a verdict of "not guilty" on the *second* count as to *all* the defendants. The alleged error was therefore harmless.

PARAGRAPH XXII.

(ASSIGNMENT OF ERROR NO. LII.)

What has been said in reference to the fifty-first assignment of error, except that it does not appear *from the stipulation*, which game the witnesses were engaged in, might be repeated here. The stipulation sought to be eliminated specifies that it should be considered *in*

evidence and read to the jury. After counsel for defendants stipulated, that certain facts may be considered in evidence, can they be heard to restrict the application of such evidence? The time at which limitation should have been considered was when the stipulation was made. Having stipulated the facts set forth in the stipulation into the evidence without any restriction as to their application, defendants should not be heard to complain thereafter. If the facts restricted were immaterial for any purpose or material only for a particular purpose, counsel for defendants should have urged the same *in the stipulation*. Not having done so they waived any right they may have had in that respect.

We maintain, however, that the inference to be drawn by the jury from the refusal of the witness to testify is a proper one. These witnesses were accomplices and particeps criminis with the defendants. Where the witness is not an accomplice of the defendant but bases his refusal to testify on a separate and distinct crime from that on which the defendant is being tried, there would be no ground for an inference against the defendant. That is not the case in this instance. Hence the jury should be allowed to draw their own inference from the refusal. As Bayley, J., said of the defendants in *R. vs. Watson*, 2 Stark 153:

“He may demur to the question for he is not bound to criminate himself; and if he refuses, this is

not without its effect on the jury . . . It would perhaps be going too far to say you may discredit him if he refuses to answer; it is for the jury to draw whatever inference they may."

In Bishop's New Criminal Procedure (Second Edition), vol. 3 p. 1301, section 117, subdivision 3, we find this statement in reference to a bawdy-house:

"Refusal to Testify—to conduct of the inmates and visitors, by witnesses who have frequented the house, on the ground that thereby they would degrade themselves, has been deemed proper for consideration by the jury," citing *Clementine vs. S.*, 14 Mo. 112.

The principle involved here was decided adversely to the contention of counsel for plaintiffs in error in the case of *Clementine vs. State*, 14 Mo. 112, 115, where it appeared that certain witnesses who frequented a bawdy house refused to answer questions as to the conduct of inmates and visitors therein on the ground that their answer would tend to their own degradation. The court held that the refusal of such witnesses to so testify was a proper matter for the consideration of the jury and upon this point stated:

"The exemption from testifying with which (in this case it was too broadly assumed) the law invests those who may probably be the only persons who can establish the fact direct, necessarily presupposes

the admission of circumstantial testimony of the character objected to, of which it may be well to remark here as elsewhere, that the refusal of various witnesses to testify in the case, upon the ground that the answers to the questions which were propounded to them, would tend to their own degradation, might well be considered by the jury in making up their verdict."

Counsel for plaintiffs in error cite *Beach vs. U. S.*, 46 Fed. 754, from which they quote in their brief, as being decisive of this point and as against our contention, but we do not so construe the opinion in that case. The eminent writer of that opinion was very careful to limit his conclusion to cases in which the witness had *no relations and was not a conspirator with the defendant nor charged in the same indictment*. The facts in the case at bar bring it within the exception mentioned in the *Beach* case. Here the witness was present when the offense was committed; was engaged with others in the commission of one of the offenses charged in the indictment; was arrested with the plaintiffs in error and other defendants below; was an accomplice, and particeps criminis with the plaintiffs in error although not a co-defendant. These facts were all disclosed by other evidence in this case.

Bearing in mind that the plaintiffs in error, Johnson and Laird, were the owner and proprietor respectively of the premises where this gambling took place,

and were present, knowing what was going on there, how could the reasoning in the Beach case apply? That opinion says:

“If he (the witness) had testified his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant.”

Not so in the case at bar if the witness criminated himself by testifying that he, the witness, was gambling he thereby established the fact that gambling was running for which Johnson as owner and Laird as proprietor were each responsible, and thereby established one element in the evidence of their guilt. Under the circumstance of the case at bar, it is impossible to imagine any testimony that the witness could have given favorable to the plaintiffs in error, if the witness criminated himself. Hence we aver that the opinion in *Beach vs. U. S.* is not only not against our contention in the case at bar, but inferentially supports our contention.

In *People vs. Mannausau et al.*, 26 N. W. 797, also cited by plaintiffs in error, we find the facts essentially different from the facts in the case at bar. There the incriminating facts concerning which the witness refused to testify had no connection with the crime for which the defendants were being tried. Consequently an inference that the witness was guilty of the crime concerning which he refused to testify, would not in any way tend to prove

the guilt or innocence of the defendants of an entirely distinct and separate crime. Hence the reasoning of the Court in that case has no application to the case at bar.

As an authority for the consideration by the jury of inferences drawn from the failure of a defendant to testify as to incriminating circumstances and events already in evidence, in which he participated and concerning which he was fully informed, we refer to the recent decision of the United States Supreme Court in the *Caminetti-Diggs* case, 242 U. S. 470, 492-495, in which an instruction was approved which told the jury, that:

“After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself with merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant’s privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration.

A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he fails to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusions as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

A proper deduction from the approval of this instruction would appear to be that the defendant can claim no protection, from inferences drawn from his failure to testify beyond the strict language of the statute. If he doesn't testify at all, the statute protects him, but if he testifies ever so little, there is no statute that gives him any protection whatever from the logical inferences drawn from his failure to testify fully.

The constitutional right of the witness not to criminate himself was intended for the protection of the witness and not of the defendant who happens to be on trial.

The witness may testify or he may refuse to testify, and in either case there is no statute giving the defendant any protection from the logical inferences to be drawn therefrom.

A similar principle was invoked in *United States vs. Carter*, 217 U. S. 286, 315-317, where it was said:

“The significant fact remains that Robert F. Westcott, though the close friend, and, indeed the affectionate friend of his ex-son-in-law, Oberlin M. Carter, did not voluntarily appear before either of the military tribunals in his defense, and, figuratively stood by him and saw him sent in ignominy to serve a term of five years for having betrayed his trust. It is true that Captain Carter says that he did all he could to persuade Mr. Westcott to appear and testify. Nevertheless the failure of Captain Carter to secure his evidence, in view of their relation, justifies a presumption that it would not have borne out the defense.”

PARAGRAPH XXIII.

(ASSIGNMENT OF ERROR NO. LIII)

This instruction is given substantially in instruction No. 5. Almost identical instructions were given and requested in *State vs. Megorden*, 49 Or. 259, 270, par. 11, and in commenting thereon the court said:

“But it is claimed that this instruction did not go far enough, and that the court should have instructed the jury that the presumption of innocence continued until the jury reached a verdict. The instruction given was as broad in that respect as the one requested. The slight difference in the phraseology of the two instructions upon the presumption of innocence until the contrary is shown or proven beyond a reasonable doubt did not alter the meaning which was the same in each. If any difference existed it was in favor of the defendant in the last instruction given.”

PARAGRAPH XXIV.

(ASSIGNMENT OF ERROR NO. LIV)

This instruction makes an assumption contrary to the evidence in that it asks the court to instruct the jury that,

“no private person can hire another to participate in a criminal offense even though such participation be for the purpose of detecting other guilty persons and relieve such participant from criminal responsibility.”

The only evidence on the point is that of E. R. Jordan, U. S. Marshal, as follows:

(Bill of Exceptions, page 91 of transcript.)

“Q. How did you employ Mr. Nelson and in what respect?

A. I told him to go down and look up any gambling and report to the office. I did that in my official capacity.”

And, again, the instruction requested makes the status of a detective who participates in a crime depend upon whether or not he was employed by an officer or a private citizen. Such is not the law. The agency employing the detective has nothing to do with determining his status, that is as to whether or not he is an accomplice. It is the purpose and intention with which the detective participates in the criminal act that determines his status. If his purpose and intention is to detect and punish the offenders, then he is not an accomplice. His previous employment and reports to officials or to his employers are relevant and material facts by reason of their tendency to establish his purpose and intent. In this case the evidence tended to show that the witness, Nelson, was employed by the U. S. Marshal to look up gambling and report to the marshal's office. The marshal paid the witness out of his own, the marshal's, private funds, the witness entered upon his work, found gambling going on in the Arctic Billiard room, entered into the games and in less than a week reported to the marshal's office that the psychological moment had arrived for a raid; returned to the Arctic Billiard room and entered into the

game, and was so engaged when the marshal's force arrived. There was no evidence to the contrary. Under this evidence the court submitted the question of whether or not the witness, Nelson, was an accomplice to the jury in instruction No. 51½. This was certainly as favorable to the defense as the facts would warrant.

In *State vs. McKean*, 36 Iowa 343, after quoting from *Rex vs. Despard*, 28 Howell's St. Trials, 346 (i. e., 498), and from *Commonwealth vs. Downing*, 4 Gray 29, and *Commonwealth vs. Villard*, 22 Pick 476, the opinion says:

"In the case under consideration the persons to whom the witness made the communications of his purpose to act the detective were not officers of law, or charged with any public duty to detect offenders. In this respect the case differed from *Rex vs. Despard*, *supra*. But this difference, perhaps, under our form of government and regime, would not be sufficient to defeat the application of the rule. The court left the credibility of the witness and the weight to be given his testimony to the consideration of the jury. Of these they were the proper judges. We do not see how we can interfere with the action of either the court or jury."

The instruction submitting the question to the jury in the above case of *State vs. McKean* was as follows:

"If you find from the evidence that the witness

Meeks went into an arrangement with the defendant and others to steal the horse in question, and did assist in taking said horse, whether or not he is an accomplice in the crime, if any has been committed, will depend whether, at the time he took the horse, he took it with felonious intent, that is, with the intent to appropriate the horse to his own use and deprive the owner of the use thereof. 9th. If at the time of the taking he was actuated by, or possessed of, such felonious intent, he is then to be regarded as an accomplice; but on the other hand, if you are satisfied from the evidence that Meeks intended from the beginning to act the part of a detective to ferret out and make known the crime and secret frauds of the defendant and others, then he is not to be regarded as an accomplice. This question of whether Meeks was an accomplice or a detective is important, and must be by you determined in view of the next instruction which I shall give you. It is a question of fact which you are to determine from the evidence. 10th. If you find, under the instructions given above, that the witness Meeks was an accomplice, the laws of this state direct that a conviction can not be had upon the testimony of an accomplice alone, unless such testimony is corroborated by such other testimony as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. But this rule of evidence does not apply if you find that Meeks was not an accomplice, but a detective."

PARAGRAPH XXV.

(ASSIGNMENT OF ERROR NO. LV.)

After the jury had been out about forty hours they returned into court and reported that they could not agree upon a verdict. Whereupon the court read to them the following:

“Gentlemen of the Jury: Upon the evidence and instructions in this case you should be able to reach a verdict.

The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.

Now I shall give you a longer time for a further and more serious consideration of this case. When you retire to the jury room again, read over the instructions of the court carefully and if there is anything about them you do not understand, so advise the Court and I will endeavor to make the same plain to you. It is your duty to arrive at a verdict in this case according to the evidence and instructions given you, irrespective of all other considerations.”

To which instruction the defendants excepted on the ground that said instruction was “an attempt to influence the jury to return a verdict against their conscience,

the jury then having been deliberating for more than forty hours.”

Remembering that a specific objection *overruled* will be effective to the extent of the grounds specified *and no further*, it becomes pertinent to consider the scope of defendants’ exception.

The objection is that this instruction is an attempt to influence the jury to return a verdict against their conscience, not because they were told it was their duty to agree upon a verdict, nor because they were told that the evidence and the law were plain, but because *they had already been deliberating for more than forty hours*. This objection or exception merely challenged the right of the court to keep the jury together for a longer period of time. It called the attention of the trial court to the long time during which the jury had already been deliberating and asserted that further deliberation would have the effect of coercing an agreement against the consciences of the jurors. There was no objection to the language of the court but merely to the act of sending them back for further deliberations.

This assignment of error therefore brings up the question of the power of the trial court to send back for further deliberation a trial jury who report their inability to agree on a verdict after having been out for forty hours. In *Hyde vs. United States*, 225 U. S. 347, 383,

the action of the trial court was approved in sending a jury back for further deliberations not only once but twice after it had already been deliberating for three days and nights without agreeing on a verdict. That the time during which a jury shall be held together for deliberation is within the discretion of the trial court is too well settled to permit of argument. See authorities cited under Points and Authorities Nos. XXV and XXVI.

PARAGRAPH XXV—Continued.

(ASSIGNMENT OF ERROR NO. LVI.)

This assignment is directed to the judgment entered in this case. Probably the purpose is to question that part of the judgment ordering the U. S. Marshal to destroy the gambling paraphernalia taken by the marshal into his custody and described in the judgment. This order is based upon section 416 of the Compiled Laws of Alaska (37 St. L. 512, Sec. 9) which provides, *inter alia*:

“nor shall the legislature or any municipality interfere with or attempt in any wise to limit the acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States Marshal or any of his deputies, or any constable or police officer, and destroyed;”

This would appear to be ample authority for the order.

MISLEADING STATEMENTS.

In the last paragraph on page 57 of the brief of plaintiffs in error we find this statement:

“Both Laird and Johnson were convicted on the second count in the indictment.”

This is an erroneous statement of a fact. The verdict, which is set out on page 32 of the transcript and again at page 160 of the transcript, states that both Laird and Johnson were found “*guilty*” on the *first* count of the indictment, and “*not guilty*” on the second count.

The indictment, pages 1 and 2 of the transcript, discloses that the first count charged “stud-poker” and the second count pangingui. Hence, the plaintiffs in error were convicted of playing “stud-poker” and not “pangingui,” as argued in their brief.

An inference sought to be conveyed by paragraph XX (page 66) of the brief of plaintiffs in error is likewise misleading. Their brief states:

“The 40th specification relates to the refusal of the court to give the following instructions requested by the defendants:

“You are instructed that the testimony of an accomplice should be viewed with distrust.”

An examination of instructions No. 6, page 25 of the transcript will show that the court instructed the jury that:

“The testimony of an accomplice ought to be viewed with distrust.”

Unless counsel intended this court to infer that said instruction was not given, it is not apparent what purpose is served by insisting upon the said assignment.

Of a like misleadnig nature are the statements and insinuations of counsel that the U. S. Marshal, Judge and U. S. Attorney were prejudiced and unfair. Does any one suppose that counsel would have failed to allege prejudice on the part of the marshal in their affidavit in support of their motion for the appointment of an elisor and would have admitted in their argument of said motion (Transcript, page 49) that no “personal animus” was shown, if any prejudice or personal animus had existed? Certainly not. All this argument and lamentation about prejudice and unfairness is an “*after-thought*.” The desperateness of their situation is manifest from counsel’s comments upon the appearance in the record in this case of the General Remarks of the Court upon gambling made at the time of pronouncing judgment.

If counsel had had sufficient interest in the matter to have read paragraph one of Rule 14 of Rules of This

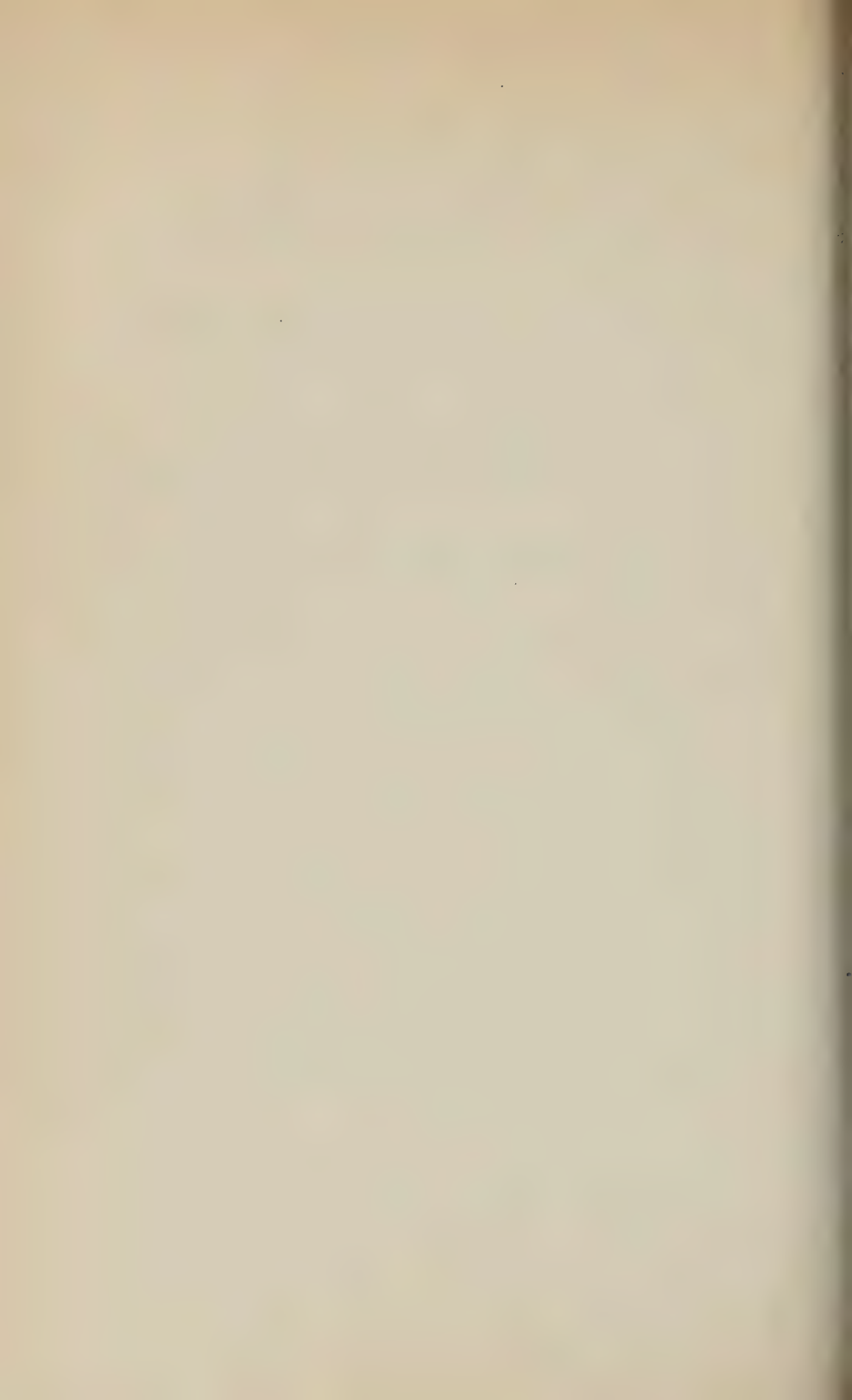
Court, it is more than probable that the reason for the appearance of such "remarks" in the record would have become apparent.

We submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

F. M. SAXTON,

United States Attorney, Second Division, District of
Alaska.



United States ⁸
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

THE UNITED STATES OF AMERICA,
Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Cor-
poration,
Appellee,

VOLUME I.
(Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for the District
of Arizona.

Filed

JAN 16 1917

F. D. Monckton,
Clerk.

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*In the District Court of the United States for the
District of Arizona.*

No. 49—IN EQUITY.

THE UNITED STATES,

Plaintiff,

vs.

B. F. SAUNDERS, THE GRAND CANYON
CATTLE COMPANY, and ORA HALEY,
Defendants.

Bill of Complaint.

To the Judge of the District Court of the United
States for the District of Arizona, Ninth Judi-
cial Circuit:

The United States, by the Attorney General,
brings this bill of complaint against B. F. Saunders,
whose first name is to the plaintiff unknown, a resi-
dent of the State of Utah, the Grand Canyon Cattle
Company, a corporation existing under and by vir-
tue of the laws of the State of California, and Ora
Haley, a resident of Wyoming, and thereupon com-
plains and shows unto your Honor:

I.

On and prior to the 24th day of October, [1*]
1901, the plaintiff was the owner in fee simple, as
a part of its public domain, of a certain tract of
land containing 19.421 acres situated in Coconino
County in the then Territory and now State of Ari-
zona and more particularly described hereinafter,

*Page-number appearing at foot of page of original certified Tran-
script of Record.

and on said date the said defendant, B. F. Saunders located the said land under the mining laws of the United States contained in Title XXXII, Chapter 6 of the Revised Statutes as amended, and designated the same as "Jacob lode claim" and thereafter, to wit, on August 8, 1904, the said B. F. Saunders filed in plaintiff's local land office at Phoenix, Arizona, his application for a patent for said tract of land, wherein he alleged and represented that the same contained gold and silver and that he had made mining improvements thereon to the value of \$550. The said B. F. Saunders subsequently filed in plaintiff's said local land office his application to purchase said tract of land and paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on November 3, 1904, issued to the said B. F. Saunders final certificate of entry No. 626, and thereafter on the 18th day of March, 1907, a patent was issued to the said B. F. Saunders conveying to him the legal title to said land designated by the Surveyor General as Lot No. 1923, and particularly described as follows: [2]

Beginning at corner No. 1 a pine post four feet long, four inches square marked 1-1923 in mound of stone, from which U. S. Location Monument No. 1 bears south forty degrees and forty-seven minutes west six thousand one hundred and forty-seven and two-tenths feet distant.

Thence, first course, north four degrees and thirty-five minutes west one thousand four hundred and ten feet to corner No. 2 a pine post four

feet long, four inches square marked 2-1923 in mound of stone.

Thence, second course, north eighty-five degrees and twenty-five minutes east six hundred feet to corner No. 3 a pine post four feet long, four inches square marked 3-1923 in mound of stone, from which discovery monument bears south twenty-five degrees and thirty-eight minutes west five hundred and ninety-six feet distant.

Thence, third course, south four degrees and thirty-five minutes east one thousand four hundred and ten feet to corner No. 4 a pine post four feet long, four inches square marked 4-1923 in mound of stone.

Thence, fourth course, south eighty-five degrees and twenty-five minutes west six hundred feet to corner No. 1, the place of beginning, said lot No. 1923 extending one thousand four hundred and ten feet in length along said Jacob vein or lode and containing nineteen acres and four hundred and twenty-one thousandths of an acre of land more or less.

II.

On and prior to the 27th day of June, 1905, the plaintiff was the owner in fee simple, as a part of its public domain, of a certain tract of land containing 17.25 acres situated in Coconino County in the then Territory and now State of Arizona and more particularly described hereinafter, and on said date the said defendant B. F. Saunders located the said land

under the said mining laws of the United States and designated the same [3] as "Emmett lode claim" and thereafter to wit, on the 13th day of December, 1905, the said B. F. Saunders filed in plaintiff's said local land office at Phoenix, Arizona, his application for patent for said tract of land wherein he alleged and represented that the same contained gold, silver, copper, lead and other valuable minerals, and that he had made mining improvements thereon to the value of \$500. The said B. F. Saunders subsequently filed in plaintiff's local land office his application to purchase said tract of land and paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on March 23, 1906, issued to the said B. F. Saunders final certificate of entry No. 153, and thereafter, to wit, on October 20, 1906, a patent was issued to the said B. F. Saunders conveying to him the legal title to the said land designated by the surveyor-general as Lot 2141 and particularly described as follows:

Beginning at corner No. 1, a pine post four feet long, four inches square marked 1-2141 with mound of stones, from which U. S. location monument No. 3 bears north seventy-five degrees and thirty-four minutes west three thousand and thirty-seven and nine-tenths feet distant.

Thence, first course, south twenty-two degrees and forty-one minutes west one thousand two hundred and thirty-six feet to corner No. 2, a pine post four feet long, four inches square

marked 2-2141 with mound of stones.

Thence, second course, south sixty-seven [4] degrees and five minutes east six hundred feet to corner No. 3, a pine post four feet long, four inches square marked 33-2141 with mound of stones, from which discovery bears north three degrees, five minutes and thirty seconds west six hundred and eighty-nine and nine-tenths feet distant.

Thence, third course, north twenty-two degrees and forty-one minutes east one thousand two hundred and thirty-six feet to corner No. 4, a pine post four feet long four inches square marked 4-2141 with mound of stone.

Thence, fourth course, north sixty-seven degrees and five minutes west six hundred feet to corner No. 1, the place of beginning; said lot No. 2141 extending one thousand two hundred and thirty-six feet in length along said Emmett vein or lode, and containing seventeen acres and twenty-five thousandths of an acre of land, more or less.

III.

On and prior to the 27th day of June, 1905, the plaintiff was the owner in fee simple, as a part of its public domain, of a certain tract of land containing 15.495 acres situated in Coconino County in the then Territory and now State of Arizona and more particularly described hereinafter, and on said date the said defendant B. F. Saunders located the said land under the said mining laws of the United States and designated the same as "Noonday lode claim"

and thereafter, to wit, on March 23, 1906, the said B. F. Saunders filed in plaintiff's said local land office at Phoenix, Arizona, his application for a patent for said tract of land wherein he alleged and [5] represented that the same contained gold, silver, copper, lead and other valuable minerals, and that he had made mining improvements thereon to the value of \$600. The said B. F. Saunders subsequently filed in plaintiff's said local land office his application to purchase said tract of land and paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on June 21, 1906, issued to the said B. F. Saunders final certificate of entry No. 170 and thereafter, to wit, on the 22d day of June, 1907, patent was issued to the said B. F. Saunders conveying to him the legal title to the said land designated by the surveyor-general as Lot No. 2140 and particularly described as follows

Beginning at corner No. 1 a pine post four feet long, four inches square marked 1-2140 in mound of stone from which U. S. Location Monument No. 5 bears south one degree and fifty-two minutes east, four hundred and eighty-five and two-tenths feet distant, and discovery bears south fifty-two degrees and fifty-five minutes east three hundred and forty-seven and two-tenths feet distant.

Thence, first course, north eighty-six degrees and sixteen minutes east three hundred feet to witness corner to corner No. 2 a cedar post four feet long, four inches square marked W.

C. 2-2140 in mound of stone, six hundred feet to corner No. 2 on ledge and not established.

Thence second course, south five degrees and thirty-five minutes west eight hundred and ninety-six feet to pine post four feet long, four inches square, marked W. C. 2-2140 in mound of stone, one thousand one hundred and forty feet to corner No. 3, a cedar post four feet long, four inches [6] square marked 3-2140 in mound of stone.

Thence, third course, south eighty-six degrees and sixteen minutes west six hundred feet to corner No. 4 a cedar post four feet long, four inches square marked 4-2140 in mound of stone.

Thence fourth course, north five degrees and thirty-five minutes west, one thousand one hundred and forty feet to corner No. 1, the place of beginning. Said lot No. 2140 extending one thousand one hundred and forty feet in length along said Noonday vein or lode and containing fifteen acres and four hundred and ninety-five thousandths of an acre of land more or less.

IV.

On and prior to February 15, 1904, the plaintiff was the owner in fee simple, as a part of its public domain, of two certain tracts of land containing 14.632 and 4.976 acres respectively, situated in Coconino County in the then Territory and now State of Arizona and more particularly described hereinafter, and on said date, the said B. F. Saunders lo-

cated the said tracts of land under the said mining laws of the United States and designated the tract containing 14.632 acres as "Sunset lode claim" and the tract containing 4.976 acres as "Sunset Millsite," and thereafter, to wit, on September 20, 1905, the said B. F. Saunders filed in plaintiff's said local land office at Phoenix his application for a patent for said tracts of land wherein he alleged and represented that the said Sunset lode claim contained gold, silver, copper, lead and other valuable [7] minerals and that he had made mining improvements thereon to the value of \$850. The said B. F. Saunders subsequently filed in plaintiff's said local land office his application to purchase said tracts of land, and also filed an affidavit executed by himself and two witnesses procured by him wherein it was alleged that the "Sunset Millsite" was used and occupied by the said B. F. Saunders for mining purposes, to wit, the storing of ore from the Sunset lode claim for milling purposes, and he paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on December 21, 1905, issued final certificate of entry No. 93, and thereafter, on the 6th day of June, 1906, a patent was issued to the said B. F. Saunders conveying to him the legal title to the two said tracts of land designated by the surveyor-general as Lot No. 2118-A, representing the Sunset lode claim, and Lot No. 2118-B, representing the Sunset Millsite, which two said tracts of land are more particularly described as follows:

Beginning for the description of the lot No.

2118-A, at corner No. 1, a cedar post four inches square, four feet long, marked 1-2118-A, with mound of stone, from which U. S. location monument No. 3 bears north six degrees and fifty-six minutes east three hundred and forty and four-tenths feet distant.

Thence, first course, north eighty-one degrees and twenty minutes east five hundred and thirty feet to corner No. 2, [8] a cedar post four inches square, four feet long, marked 2-2118-A, with mound of stone.

Thence, second course, north eight degrees and twenty-one minutes west one thousand one hundred and seventy-four and nine-tenths feet to corner No. 3, a cedar post four inches square, four feet long, marked 3-2118-A, with mound of stone, from which discovery bears south twelve degrees and fifty-seven minutes west six hundred and sixty-five and nine-tenths feet distant.

Thence, third course, south eighty-one degrees and twenty minutes west five hundred and fifty-five feet to corner No. 4, a cedar post four inches square, four feet long, marked 4-2118-A, with mound of stone.

Thence, fourth course, south nine degrees and thirty-four minutes east one thousand one hundred and seventy-five feet to corner No. 1, the place of beginning, said lot No. 2118-A, extending one thousand one hundred and seventy-five feet in length along said Sunset vein or lode

and containing fourteen acres and six hundred and thirty-two thousandths of an acre.

Beginning for the description of the lot No. 2118-B, the Sunset Millsite claim, at corner No. 1, a cedar post four inches square, four feet long, marked 1-2118-B with mound of stone, from which said U. S. location monument No. 3 bears south forty-six degrees and fifteen minutes east two thousand nine hundred and twenty-six and seven-tenths feet distant and corner No. 4 of said lot No. 2118-A bears south fifty-seven degrees and twenty minutes east two thousand two hundred and thirty feet distant.

Thence, first course, north twenty-four degrees east five hundred and ten feet to corner No. 2, a pine post four inches square, four feet long, marked 2-2118-B with mound of stone.

Thence, second course, north sixty-six degrees west four hundred and twenty-five feet to corner No. 3, a pine post four inches square, four feet long, marked 3-2118-B with mound of stone.

Thence, third course, south twenty-four degrees east five hundred and ten feet to corner No. 4, a pine post four inches square four feet long, marked 2-2118-B with mound of stone.

Thence, fourth course, south sixty-six degrees east four hundred and twenty-five feet to corner No. 1, the place of beginning; said lot No. 2118-B, containing four acres and nine hundred and seventy-six thousandths of an acre, which together with the area embraced in said lot No.

2118-A aggregates nineteen acres and six hundred and eight thousandths of an acre of land, more or less. [9]

V.

The plaintiff avers that the representations so made by the said B. F. Saunders were and are wholly false, fraudulent and untrue and were made by the said B. F. Saunders for the purpose of deceiving the officials of the plaintiff's land department and without any belief on the part of the said B. F. Saunders that the said statements and representations or any of them were true; that in truth and in fact the said lands located and entered as lode claims were not and are not mineral lands and did not and do not bear gold, silver, copper, lead or any other valuable mineral; that at the time of the filing of the said applications to purchase no gold, silver, copper, lead or other valuable mineral had been discovered on said lands or any of them, nor has any been discovered since; that the said lands so located, applied for and entered as lode claims were not so located, applied for and entered by the said B. F. Saunders for mining purposes or because of any minerals therein, and the said Sunset Millsite was not occupied and used by the said B. F. Saunders for mining purposes, for the storage of ore from the said Sunset lode claim or any other claim, but all of said lands, those designated as lode claims as well as the tract designated as a mill site, were so [10] located, applied for and entered for the sole purpose of obtaining the exclusive possession, enjoyment and control of valuable springs of water existing thereon, and the said

B. F. Saunders had not expended the respective sums alleged to have been expended by him, or any sum of money, in making mining improvements on said lands and had made no mining improvements whatever on the same, the only improvements made on said lands or any of them by the said B. F. Saunders or any one in his behalf were made for the purpose of developing the said water supply and not for mineral or mining purposes.

VI.

The plaintiff further shows that on the 2d day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the lands described as "Jacob lode claim" and "Emmett lode claim" to the defendant corporation, The Grand Canyon Cattle Company, and on the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the land described as the "Noonday lode claim," the "Sunset lode claim" and the "Sunset Millsite" to the said defendant corporation, The Grand Canyon Cattle Company, which said company at the times of the execution of the said [11] deeds and prior to any contract or agreement to purchase said lands or any part thereof from the said B. F. Saunders was fully notified and informed of the said illegal methods and proceedings by means of which the said G. F. Saunders had acquired plaintiff's patents for said lands; that the plaintiff was misled and deceived by the false, fraudulent and untrue representations and statements so made by the said B. F. Saunders and because of such deception was induced to allow the said entries and

to cause the said patents to be issued thereon in the manner and form hereinbefore alleged, all of which actions, doings and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest injury and oppression of the plaintiff in the premises. Plaintiff further shows unto your Honor that one Ora Haley, a resident of the State of Wyoming, is said to have at some time claimed some right or interest in the said lands, but as to the nature and extent of such claim or whether said Ora Haley is now asserting the same, the plaintiff is not informed, and to the end that he may be required to answer and disclose the nature and extent of such interest as he may claim or disclaim any interest in the premises involved, the said Ora Haley is made a defendant to this bill. [12]

In consideration whereof and forasmuch as the plaintiff is without full and adequate remedy in the premises save in a court of equity, and to the end that the said defendants may make full, true and direct answers to all and singular the matters and things herein set forth as fully as if they had been particularly interrogated, but not under oath, their answers under oath being hereby expressly waived, and to the end that the said patents which issued to the said B. F. Saunders and the said deeds executed by the said B. F. Saunders conveying the title to said lands to the said The Grand Canyon Cattle Company may be declared null and void and to be set aside, revoked and held for naught, and be delivered up and surrendered by the said defendants under the Court's command for cancellation, and that the said described

lands may be adjudged and decreed to be the perfect property of the plaintiff free and clear of all claims of the said defendants, and that the said defendants may be ordered, adjudged and decreed to execute and deliver to the plaintiff a good and sufficient deed conveying the said lands free and clear of all liens, incumbrances, outstanding claims or clouds whatsoever to the plaintiff in fee simple absolute and that the said defendants during the progress of this cause and thereafter finally and perpetually may be enjoined from setting up any claim to the said lands, or any part thereof, and from creating any cloud upon plaintiff's [13] title to the same and that the possession thereof may be restored to the plaintiff and that the plaintiff may have such other and further relief as may seem just to this Honorable Court and agreeable to equity and good conscience.

May it please your Honor to grant unto the plaintiff writs of subpoena issued by and under the seal of this Honorable Court, directed to the said defendants, the said B. F. Saunders, The Grand Canyon Cattle Company and Ora Haley, thereby commanding them at a certain time and under a certain penalty therein to be named, to appear before this Honorable Court and then and there full, true and direct answers make to all and singular the premises and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises

as shall seem meet and agreeable in equity.

GEORGE W. WICKERSHAM,

Attorney General of the United States.

J. E. MORRISON,

United States Attorney for the District of Arizona.

[14]

[Endorsements]: No. 49. In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders, The Grand Cattle Company, a Corporation, and Ora Haley, Defendants. Bill. Filed May 25, 1912, at 9:10 A. M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy. [15]

*In the District Court of the United States for the
District of Arizona.*

No. —.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS et al.,

Defendants.

**Stipulation Re Signing of Answer of Grand Canyon
Cattle Co.**

It is hereby stipulated by counsel for the plaintiff, The United States of America, and by counsel for the defendant, the Grand Canyon Cattle Company, that the answer of the defendant, the Grand Canyon Cattle Company in the above-entitled cause may be signed by counsel only, and that the answer under

oath and signature by the defendant is hereby waived.

J. E. MORRISON,
United States Attorney for the District of Arizona.
KIBBEY, BENNETT & BENNETT,
Attorneys for Grand Canyon Cattle Company.

[Endorsements]: No. 49. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders et al., Defendants. Stipulation. Kibbey, Bennett & Bennett, of Counsel for Defendant Grand Canyon Cattle Company. Filed Dec. 27, 1912, at 4 P. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy. [16]

*In the District Court of the United States for the
District of Arizona.*

No. 49.

THE UNITED STATES,

Plaintiff,

vs.

B. F. SAUNDERS, THE GRAND CANYON CAT-
TLE COMPANY and ORA HALEY,

Defendants.

**Demurrer of Grand Canyon Cattle Company to Bill
of Complaint.**

THE DEMURRER OF THE GRAND CANYON
CATTLE COMPANY, A CORPORATION,
TO THE BILL OF COMPLAINT OF THE
UNITED STATES, THE PLAINTIFF, IN
THE ABOVE-ENTITLED CAUSE.

This defendant, The Grand Canyon Cattle Company, a corporation, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth that the said plaintiff has not in and by said bill made or stated such a cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for against this defendant.

Wherefore this defendant demands the judgment of this Honorable Court whether it shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

KIBBEY, BENNETT & BENNETT,
Solicitors for Defendant, The Grand Canyon Cattle
Company. [17]

State of California,
County of Los Angeles,—ss.

J. S. Torrance makes solemn oath and says: That he is the vice-president of the Grand Canyon Cattle Company, the above-named corporation, defendant, and that the foregoing demurrer is not interposed for delay.

J. S. TORRANCE.

Sworn to and subscribed before me this 22d day of
July, 1912.

[Notarial Seal]

JUNE OLSON,
Notary Public.

My commission expires October 22, 1912.

We hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law.

KIBBEY, BENNETT & BENNETT,
Counsel for Defendant.

[Endorsements]: No. 49. In the District Court of the United States for the District of Arizona. The United States, Plaintiff, vs. B. F. Saunders et al., Defendants. Demurrer. Filed July 26, 1912, at 11:30 A. M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy. Kibbey, Bennett & Bennett, Counsel for Defendant Grand Canyon Cattle Co. [18]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of December 2d, 1912.

No. 49 (Phoenix).

UNITED STATES OF AMERICA,
Plaintiff,
vs.

B. F. SAUNDERS et al.,
Defendants.

Minutes of Court—December 2, 1912—Order Sustaining Demurrer to Complaint, etc.

The demurrer of the defendant Grand Canyon Cattle Company having been heretofore argued and fully submitted to the Court and the Court being now fully advised in the premises, does sustain said demurrer with leave to the plaintiff to amend the complaint herein. [19]

*In the District Court of the United States for the
District of Arizona.*

No. 49—IN EQUITY.

THE UNITED STATES,

Plaintiff,

vs.

B. F. SAUNDERS, THE GRAND CANYON CAT-
TLE COMPANY, and ORA HALEY,

Defendants.

Amended Bill of Complaint.

To the Judge of the District Court of the United
States for the District of Arizona, Ninth Judicial
Circuit:

The United States, by the Attorney General, brings
this bill of complaint against B. F. Saunders, whose
first name is to the plaintiff unknown, a resident of
the State of Utah, the Grand Canyon Cattle Com-
pany, a corporation existing under and by virtue of
the laws of the State of California, and Ora Haley,
a resident of Wyoming, and thereupon complains and
shows unto your Honor:

I.

On and prior to the 24th day of October, 1901, the
plaintiff was the owner in fee simple, as a part of its
public domain, of a certain tract of land containing
[20] 19,421 acres situated in Coconino County in
the then Territory and now State of Arizona, and
more particularly described hereinafter, and on said
date the said defendant B. F. Saunders located said
land under the mining laws of the United States con-

tained in Title XXXII, Chapter 6, of the Revised Statutes as amended, and designated the same as "Jacob lode claim," and thereafter, to wit, on August 8, 1904, the said B. F. Saunders filed in plaintiff's local land office at Phoenix, Arizona, his application for a patent for said tract of land wherein he alleged and represented that the same contained gold and silver, and that he had made mining improvements thereon to the value of \$550. The said B. F. Saunders subsequently filed in plaintiff's said local land office his application to purchase said tracts of land and paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on November 3, 1904, issued to the said B. F. Saunders final certificate No. 626, and thereafter on the 18th day of March, 1907, a patent was issued to the said B. F. Saunders conveying to him the legal title to said land designated by the surveyor general as Lot No. 1923, and particularly described as follows:

Beginning at corner No. 1, a pine post four feet long, four inches square, marked 1-1923, in mound of stone, from which U. S. Location Monument No. 1 bears south forty degrees and forty-seven minutes, west six thousand one hundred and forty-seven and two-tenths feet distant.

Thence, first course, north four degrees and thirty-five minutes west one thousand four hundred and [21] ten feet to corner No. 2, a pine post four feet long, four inches square, marked 2-1923 in mound of stones.

Thence, second course, north eighty-five de-

degrees and twenty-five minutes east six hundred feet to corner No. 3, a pine post four feet long, four inches square, marked 3-1923 in mound of stone, from which discovery monument bears south twenty-five degrees and thirty-eight minutes west five hundred and ninety-six feet distant.

Thence, this course, south four degrees and thirty-five minutes east one thousand four hundred and ten feet to corner No. 4 a pine post four feet long, four inches square marked 4-1923 in mound of stone.

Thence, fourth course, south eighty-five degrees and twenty-five minutes west six hundred feet to corner No. 1, the place of the beginning, said lot No. 1923 extending one thousand four hundred and ten feet in length along said Jacob vein or lode and containing nineteen acres and four hundred and twenty-one thousandths of an acre of land more or less.

II.

On and prior to the 27th day of June, 1905, the plaintiff was the owner in fee simple, as part of its public domain, of certain tract of land containing 17.25 acres situated in Coconino County in the then Territory and now State of Arizona and more particularly described hereinafter, and on said date the said defendant B. F. Saunders located the said land under the said mining laws of the United States and designated the same as "Emmett lode claim," and thereafter, to wit, on the 13th day of December, 1905, the said B. F. Saunders filed in plaintiff's said local land office at Phoenix, Arizona, his application for patent for said tract of land wherein he alleged and repre-

sented that the same contained gold, silver, copper, lead, and other valuable minerals, and that he had made mining improvements thereon to the value of \$500. The said B. F. Saunders subsequently filed [22] in plaintiff's said local land office his application to purchase said tract of land and paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on March 23, 1906, issued to the said B. F. Saunders final certificate of entry No. 153, and thereafter, to wit, on October 20, 1906 a patent was issued to the said B. F. Saunders conveying to him the legal title to the said land designated by the surveyor-general as Lot No. 2141, and particularly described as follows:

Beginning at corner No. 1, a pine post four feet long, four inches square marked 1-2141 with mound of stones, from which U. S. location monument No. 3 bears north seventy-five degrees and thirty-four minutes west three thousand and thirty-seven and nine-tenths feet distant.

Thence, first course, south, twenty-two degrees and forty-one minutes west one thousand two hundred and thirty-six feet to corner No. 2, a pine post four feet long, four inches square marked 2-2141 with mound of stones.

Thence, second course, south sixty-seven degrees and five minutes east six hundred feet to corner No. 3, a pine post four feet long four inches square marked 3-2141 with mound of stones, from which discovery bears north three degrees, five minutes and thirty seconds west

six hundred and eighty-nine and nine-tenths feet distant.

Thence, third course, north twenty-two degrees and forty-one minutes east one thousand two hundred and thirty-six feet to corner No. 4, a pine post four feet long, four inches square marked 4-2141 with mound of stone.

Thence, fourth course, north sixty-seven degrees and five minutes west six hundred feet to corner No. 1, the place of beginning; said Lot No. 2141 extending one thousand two hundred and thirty-six feet in length along said Emmett vein or lode, and containing seventeen acres and twenty-five thousandths of an acre of land, more or less.

III.

On and prior to the 27th day of June, 1905, the plaintiff was the owner in fee simple, as a part [23] of its public domain, of a certain tract of land containing 15.495 acres situated in Coconino County in the then Territory of Arizona and now State of Arizona, and more particularly described hereinafter, and on said date the said defendant B. F. Saunders located the said land under the said mining laws of the United States and designated the same as "Noon-day lode claim" and thereafter, to wit, on March 23, 1906, the said B. F. Saunders filed in plaintiff's said local land office at Phoenix, Arizona, his application for a patent for said tract of land wherein he alleged and represented that the same contained gold, silver, copper, lead and other valuable minerals, and that he had made mining improvements thereon to the

value of \$600. The said B. F. Saunders subsequently filed in plaintiff's said local land office his application to purchase said tract of land and paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on June 21, 1906, issued to the said B. F. Saunders final certificate of entry No. 170, and thereafter, to wit, on the 22d day of June, 1907, patent was issued to the said B. F. Saunders conveying to him the legal title to the said land designated by the surveyor-general as Lot No. 2140, and particularly described as follows:

Beginning at corner No. 1 a pine post four feet long, four inches square marked 1-2140 in mound of stone from which U. S. Location Monument No. 5 bears south one degree and fifty-two minutes east, four hundred and eighty-five and two-tenths feet distant, and discovery bears south fifty-two degrees and fifty-five minutes east three hundred and forty-seven and two-tenths feet distant.

Thence, first course, north eighty-six degrees and sixteen minutes east three hundred feet to witness corner to corner No. 2 a cedar post four feet long, four inches square marked W. C. 2-2140 in mound of stone, six [24] hundred feet to corner No. 2 on ledge and not established.

Thence, second course, south five degrees thirty-five minutes west eight hundred and ninety-six feet to pine post four feet long, four inches square, marked W. C. 2-2140 in mound of stone, one thousand one hundred and forty

feet to corner No. 3 a cedar post four feet long, four inches square marked 3-2140 in mound of stone.

Thence third course, south eighty-six degrees and sixteen minutes west six hundred feet to corner No. 4 a cedar post four feet long, four inches square marked 2-2140 in mound of stone.

Thence fourth course, north five degrees and thirty-five minutes west one thousand one hundred and forty feet to corner No. 1, the place of beginning. Said lot No. 2140 extending one thousand one hundred and forty feet in length along said Noonday vein or lode and containing fifteen acres and four hundred and ninety-five thousandths of an acre of land, more or less.

IV.

On and prior to February 15, 1904, the plaintiff was the owner in fee simple, as a part of its public domain, of two certain tracts of land containing 14.632 and 4.976 acres respectively, situated in Coconino County in the then Territory and now State of Arizona, and more particularly described hereinafter, and on said date the said B. F. Saunders located the said tracts of land under the said mining laws of the United States and designated the tract containing 14.632 acres as "Sunset lode claim," and the tract containing 4.976 acres as "Sunset Millsite," and thereafter, to wit, On September 20, 1905, the said B. F. Saunders filed in plaintiff's said local land office at Phoenix his application for a patent for said tracts of land wherein he alleged and represented that the said Sunset lode claim contained gold,

silver, copper, lead and other valuable minerals, and that he had made mining improvements [25] thereon to the value of \$850. The said B. F. Saunders subsequently filed in plaintiff's said local land office his application to purchase said tracts of land, and also filed an affidavit executed by himself and two witnesses procured by him, wherein it was alleged that the "Sunset Millsite" was used and occupied by the said B. F. Saunders for mining purposes, to wit, the storing of ore from the Sunset lode claim for milling purposes, and he paid the fees and purchase price required by law, upon which the register of plaintiff's said local land office on December 21, 1905, issued final certificate of entry No. 93, and thereafter, on the 6th day of June, 1906, a patent was issued to the said B. F. Saunders conveying to him the legal title to the two said tracts of land designated by the surveyor-general as Lot No. 2118-A, representing the Sunset lode claim, and Lot No. 2118-B, representing the Sunset Millsite, which two said tracts of land are more particularly described as follows:

Beginning for the description of the lot No. 2118-A, at corner No. 1, a cedar post four inches square, four feet long, marked 1, 2118-A, with mound of stone, from which U. S. location monument No. 3 bears north six degrees and fifty-six minutes east three hundred and forty and four-tenths feet distant.

Thence, first course, north eighty-one degrees and twenty minutes east five hundred and thirty feet to corner No. 2, a cedar post, four inches

square, four feet long, marked 2-2118 A, with mound of stone.

Thence, second course, north eight degrees and twenty-one minutes west one thousand one hundred and seventy-four and nine-tenths feet to corner No. 3, a cedar post four inches square, four feet long, marked 3-2118-A, with mound of stone, from which discovery bears south twelve degrees and fifty-seven minutes west six hundred and sixty-five and nine-tenths feet distant.

Thence, third course, south eighty-one degrees and twenty minutes west five hundred and fifty-five feet to corner No. 4, a cedar post four inches square, four feet long, marked A-2118-A, with mound of stone. [26]

Thence, fourth course, south nine degrees and thirty-four minutes east one thousand one hundred and seventy-five feet to corner No. 1, the place of beginning, said lot No. 2118-A extending one thousand one hundred and seventy-five feet in length along said Sunset vein or lode and containing fourteen acres and six hundred and thirty-two thousandths of an acre.

Beginning for the description of the lot No. 2118-B, the Sunset Millsite claim, at corner No. 1, a cedar post four inches square, four feet long, marked 1-2118-B with mound of stone, from which said U. S. location monument No. 3 bears south forty-six degrees and fifteen minutes east two thousand nine hundred and twenty-six and seven-tenths feet distant and corner No. 4 of

said lot No. 2118-A bears south fifty-seven degrees and twenty minutes east two thousand two hundred and thirty feet distant.

Thence, first course, north twenty-four degrees east five hundred and ten feet to corner No. 2, a pine post four inches square, four feet long, marked 2-2118-B with mound of stone.

Thence, second course, north sixty-six degrees west four hundred and twenty-five feet to corner No. 3, a pine post four inches square, four feet long, marked 3-2118-B with mound of stone.

Thence, third course, south twenty-four degrees west five hundred and ten feet to corner No. 4, a pine post four inches square four feet long, marked 4-2118-B with mound of stone.

Thence, fourth course, south sixty-six degrees east four hundred and twenty-five feet to corner No. 1, the place of beginning; said lot No. 2118-B, containing four acres and nine hundred and seventy-six thousandths of an acre, which, together with the area embraced in said lot No. 2118-A aggregates nineteen acres and six hundred and eight thousandths of an acre of land, more or less.

V.

The plaintiff avers that the representations so made by the said B. F. Saunders were and are wholly false, fraudulent and untrue, and were made by the said B. F. Saunders for the purpose of deceiving the officials of the plaintiff's land department without and belief on the part of the said B. F. Saunders that the said statements and representations, or any

of them, were true; that in truth and in fact the said lands located and entered as lode claims were not and are not mineral lands, and did not and do not bear gold, silver, copper, lead, or [27] any other valuable mineral; that at the time of the filing of the said applications to purchase, no gold, silver, copper, lead or other valuable mineral had been discovered on said lands, or any of them, nor has any been discovered since; that the said lands so located, applied for and entered as lode claims were not so located, applied for and entered by the said B. F. Saunders for mining purposes or because of any minerals therein, and the said Sunset Millsite was not occupied and used by the said B. F. Saunders for mining purposes, for the storage of ore from the said Sunset lode claim, or any other claim, but all of said lands, those designated as lode claims, as well as the tract designated as a mill site, were so located, applied for and entered for the sole purpose of obtaining the exclusive possession, enjoyment and control of valuable springs of water existing thereon, and the said B. F. Saunders has not expended the respective sums alleged to have been expended by him, or any sum of money, in making mining improvements on said lands, and had made no mining improvements whatever on the same, the only improvements made on said lands or any of them by the said B. F. Saunders, or any one in his behalf, were made for the purpose of developing the said water supply and not for mineral or mining purposes.

VI.

The plaintiff further shows that on the 2d [28] day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the lands described as "Jacob lode claim" and "Emmett lode claim" to the defendant corporation, The Grand Canyon Cattle Company, and on the 5th day of December, 1907 the said B. F. Saunders executed a deed conveying the legal title to the land described as the "Noonday lode claim," the "Sunset lode claim" and the "Sunset Millsite" to the said defendant corporation, The Grand Canyon Cattle Company, which said company, at the time of the execution of the said deeds, and prior to any contract or agreement to purchase said lands, or any part thereof, from the said B. F. Saunders, was fully notified and informed of the said illegal methods and proceedings, and at all times herein mentioned well knew said methods and proceedings to be false, fraudulent and untrue, and well knew said methods and proceedings were the means by and through which the said B. F. Saunders acquired plaintiff's patents for said lands; that the plaintiff was misled and deceived by the false, fraudulent and untrue representations and statements so made by the said B. F. Saunders, and because of such deception was induced to allow the said entries and to cause the said patents to be issued thereon in the manner and form hereinbefore alleged, all of which actions, doings and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest injury and oppression of the plaintiff in

the premises. Plaintiff further shows unto your Honor that one Ora Haley, a resident of the State of Wyoming is said to have at some time claimed some right or interest in the said lands, but as to the nature and extent [29] of such claim or whether said Ora Haley is now asserting the same, the plaintiff is not informed, and to the end that he may be required to answer and disclose the nature and extent of such interest as he may claim or disclaim any interest in the premises involved, the said Ora Haley is made a defendant to this bill.

In consideration whereof, and forasmuch as the plaintiff is without full and adequate remedy in the premises save in a court of equity, and to the end that the said defendants may make full, true and direct answers to all and singular the matters and things herein set forth as fully as if they had been particularly interrogated, but not under oath, their answers under oath being hereby expressly waived, and to the end that the said patents which issued to the said B. F. Saunders and the said deeds executed by the said B. F. Saunders conveying the title to said lands to the said The Grand Canyon Cattle Company may be declared null and void and be set aside, revoked and held for naught, and be delivered up and surrendered by the said defendants under the court's command for cancellation, and that the said described lands may be adjudged and decreed to be the perfect property of the plaintiff free and clear of all claims of the said defendants, and that the said defendants may be ordered, adjudged and decreed to execute and deliver to the plaintiff a

good and sufficient deed conveying the said lands free and clear of all liens, incumbrances, outstanding claims or clouds whatsoever to the plaintiff in fee simple absolute and that [30] the said defendants during the progress of this cause and thereafter finally and perpetually may be enjoined from setting up any claim to the said lands, or any part thereof, and from creating any cloud upon plaintiff's title to the same, and that the possession thereof may be restored to the plaintiff, and that the plaintiff may have such other and further relief as may seem just to this Honorable Court and agreeable to equity and good conscience.

May it please your Honor to grant unto the plaintiff writs of subpoena issued by and under the seal of this Honorable Court, directed to the said defendants, the said B. F. Saunders, The Grand Canyon Cattle Company and Ora Haley, thereby commanding them at a certain time and under a certain penalty therein to be named, to appear before this Honorable Court and then and there full, true and direct answers make to all and singular the premises and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable in equity.

GEORGE W. WICKERSHAM,
Attorney General of the United States.

J. E. MORRISON,
United States Attorney for the District of Arizona.

[Endorsements]: No. 49. In the United States District Court for the District of Arizona. The United States, Plaintiff, v. B. F. Saunders, The Grand Canyon Cattle Company, a Corporation, and Ora Haley, Defendants. Amended Bill. George W. Wickersham, Atty. Gen'l of the United States. J. E. Morrison, U. S. Atty. for District of Arizona. Filed Dec. 12, 1912, at 1 P. M., Allan B. Jaynes, Clerk. By Frank E. McCreary, Deputy. [32]

*In the District Court of the United States, for the
District of Arizona.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Statement of the Evidence. [33]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—No. 49.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Evidence.

This cause coming on for hearing before the above court, at Phoenix, Arizona, on January 11th, 1915, before Hon. William H. Sawtelle, District Judge; James M. Sheridan, Special Assistant Attorney General; Thomas A. Flynn, United States Attorney, and Samuel L. Pattee, Assistant United States Attorney, appearing for plaintiff, and Messrs. Kibby, Bennett & Bennett, Henry J. Stevens, and Walter K. Tuller, appearing for the defendants.

AND THEREUPON the following evidence, both oral and documentary, was offered by the respective parties: [36]

The Government offered in evidence a certified copy of the map of the Kaibab National Forest, which has a diagram accompanying the President's proclamation, of date May 19th, 1913, admitted in evidence, and marked "Government's Exhibit 1."

Deposition of Charles Dimmick, for the Government.

The Government then offered the deposition of Charles Dimmick, which was read by Mr. Sheridan, and in which the witness testified as follows:

"My name is Charles Dimmick, and I am forty-one years old; I reside at present at Barclay, Nevada; my occupation is stock-raising and rancher. I have been in the employ of the defendants, B. F. Saunders and Ora Haley; I first entered their service the 15th of April, 1894, I believe, in ranching and cattle-raising, at Green Springs, Arizona, or Pahrashaunt, Arizona. That is in the northwestern part of Arizona on the north side of the Grand

(Deposition of Charles Dimmick.)

Canyon. I was at that time in the employ of Mr. Saunders. I don't think that Saunders and Haley were engaged in business in a partnership relation at that time. It is my belief that it was just Mr. Saunders, I don't know positively whether Haley was in partnership at that time, I think not. As nearly as I can remember Mr. Haley went in with Mr. Saunders in 1897, possibly in 1896, but I think in 1897, and Mr. Haley at that time joined Mr. Saunders in the cattle business also. At the time I first entered the service of Mr. Saunders in April, 1894, Mr. Saunders had a ranch that was known by the name of Pahrashaunt, or Green Springs ranch; he had another ranch in that vicinity at that time known as the Canaan ranch, that was a year later, 1895. At the time I first went to work for Mr. Saunders at the Pahrashaunt or Green Springs ranch they had about three thousand head of cattle, some few ranch horses, possibly a hundred head of saddle horses. I couldn't say how many watering places—five or six watering places. I recall the names of some of the watering places. There was Green Springs, Oak Grove, Mokiak, Piney. I can't recall the name of the other now. There was a lake called Lake Flat. Mr. Saunders had about three thousand head [37] of cattle. I don't think he owned any land in connection with these ranches at that time, he had just settled on that ranch and ran his cattle as was the general custom in those places.

I cannot describe the other ranch, the Canaan ranch, as it was at that time because I was not on it.

(Deposition of Charles Dimmick.)

It was about one hundred twenty-five miles from the Green Springs ranch in a northwesterly direction or north of east; it was not directly northeast. When I first became acquainted with that ranch I knew practically nothing of it. I commenced work with Mr. Saunders in 1894, and remained in his employ until the Grand Canyon Cattle Company purchased from him. During the time I was employed by Mr. Saunders his stock increased, and his ranch holdings and water holdings and ranch accommodations increased by buying and getting more stock, more watering places and ranch privileges and improving these places. At that time they sold to the Grand Canyon Cattle Company they had considerably larger holdings of cattle and larger ranch facilities. At the time of the sale to the Grand Canyon Cattle Company Saunders and Haley had about ten thousand head of stock. That was in October, 1907.

At the time I went to work for Mr. Saunders there was practically not water facilities for any larger number of cattle than they had at that time on that ranch. In order to improve the situation to meet the larger number of cattle that was subsequently acquired, more ranches and watering places were purchased, and these places developed in different places than the Pahrashaunt country. I have named the watering places as near as I can recall them that were in the ranch of Saunders at the time I went to work for him. 'There were other ranches or ranges known by different names than those

(Deposition of Charles Dimmick.)

already given by me, subsequently acquired by Saunders and Haley. There was the Canaan ranch, the Buckskin Mountain ranch, the Kane Beds ranch, the Pipe Springs ranch, The Green Springs or Pahrashaunt ranch was not within the boundaries of the Kaibab National Forest when it was established. It was to the south of west of the Kaibab National Forest, practically west. [38]

Among the ranches I have named the Buckskin Mountain ranch and the Kane Beds ranch were found within the boundaries of the Kaibab National Forest, or near the Kaibab National Forest. The Kane Beds ranch was thirty-five miles west and a little north of west of that forest. When Saunders and Haley sold out to the Grand Canyon Cattle Company they sold these ranches outside of the Kaibab Forest that I have named. The one outside the Kaibab was the Kane Beds. Part of the Buckskin Mountain ranch, practically half of it, is off the Kaibab National Forest, but it is all considered and comes under the head of the Buckskin or V. T. ranch, but it is not all on the forest. What was sold by Saunders and Haley to the Grand Canyon Cattle Company was the Buckskin Mountain ranch or the V. T. ranch, they being the same, and the Kane Beds. The Buckskin Mountain ranch or V. T. ranch was partly within and partly without the Kaibab Reserve, and the Kane Beds ranch was entirely outside the Kaibab Reserve.

After I went into the employ of Mr. Saunders in 1894, and down to the time of the sale to the Grand

(Deposition of Charles Dimmick.)

Canyon Cattle Company, Saunders and Haley developed water on the Buckskin Mountain or V. T. ranch by digging out springs and piping the water, reservoiring, tanking—practically the best way for holding and saving living waters, and also in accumulating flood waters. I can't say who outlined or planned the matter in which this water should be developed; practically every man in their employment; also including Mr. Saunders. When I went to work for Mr. Saunders I was in charge of the pump station; that was not on the Buckskin Mountain ranch, but on the Green Springs and Pahrashaunt ranch. I came down to go to work on the Buckskin Mountain ranch in the fall of 1897 or 1898—1897, I believe. I went to work for them on the Bucksin Mountain ranch in the handling of stock. I was not installed at that time as manager or supervisor or in any particular capacity—simply as [39] one of the men employed on the ranch trailing cattle at that time. Subsequently to the time I went to work on the Buckskin ranch and before the time of the sale to the Grand Canyon Cattle Company I received an appointment as local representative or agent for Mr. Saunders and Mr. Haley on that ranch. That was about six years before the purchase by the Grand Canyon Cattle Company; in the spring of 1901, I believe. I was then appointed general foreman on the Buckskin or V. T. ranch.

(It is agreed between the counsel that when the Buckskin Mountain ranch is referred to it means also the ranch as described as the V. T. ranch.)

(Deposition of Charles Dimmick.)

Prior to 1901 I was only on the Buckskin Mountain ranch at times and only about a year altogether that whole period. The rest of that time from 1897 to 1901 I was engaged in southern Idaho, Wyoming and eastern Nevada. When I was at these other places I worked for Saunders and Haley also, but not on the other ranches owned by Saunders and Haley. I was trailing stock, general handling of stock on forest reserves and the public domain summer grazing and shipping. I didn't have anything personal to do with the development of water between 1897, when I first went to work on the Buckskin Mountain Ranch, and 1901, when I was appointed ranch foreman. After I was appointed ranch foreman in 1901, between that time and the time the sale was made between Saunders and Haley to the Grand Canyon Cattle Company I did have to do with the development of water on the Buckskin Mountain Ranch. After I was appointed ranch foreman I received my instructions as to the manner in which the water should be developed from B. F. Saunders. I received these instructions both in writing and orally. I do not have in my possession any written instructions I received at that time from Mr. Saunders, or Saunders and Haley in this regard. They were burned up. At the present I have no record relating to my former employment with Saunders and Haley. As nearly as I can recall the substance of those instructions as to what to do about the water was fixing and developing it in the best way it could be done, practically leaving it to my judgment

(Deposition of Charles Dimmick.)

as to how to do it. The details of [40] the manner of developing the water on the ground where it was not already developed or caring for it where it already existed in pools and springs was left to my judgment, and I attended to it. I had people assisting me in carrying on this development work, but I can't give the names of them. They were practically not persons who were employed on the ranch with me at that time. They were people employed by me especially to develop the water. Mostly people whom I found in that vicinity. There were three or four persons who were not in that vicinity that were employed to assist me in that work. I have forgotten their names; they were from Salt Lake. I do not recall whether I had an engineer or surveyor as assistant in developing these water supplies. John T. Breckon was sent down by Mr. Saunders to do some surveying, I do not recall in what year Mr. Breckon came down there. There was also an engineer by the name of Horn sent there by Mr. Saunders to do some surveying. I can't say what surveying Mr. Breckon and Mr. Horn did on the Buckskin Mountain ranch, I was not with them but a very little time.

At the time when I first went to work on the Buckskin Mountain ranch, 1897, Saunders and Haley had on that ranch I think about four thousand head of cattle, and there were about ten thousand head when they sold it. And this water development that I speak of and which began in 1901, was necessary to meet the demands of this larger body of cattle. I believe there was some sort of filings made on some

(Deposition of Charles Dimmick.)

of the lands on which these waters were found on the Buckskin Mountain ranch or the range used in connection with that ranch. There was one on Soap Creek; I believe that was scrip. And pools. I don't mean what is known as the Jacobs Pools, but just "The Pools." The form of location on the Pools was scrip; on the House Rock, scrip; Two-mile, scrip; Kane Springs, scrip; One-mile,—I am not positive about it, I think it was not scrip. There were others, the South Canyon, by permission of the Forest service.

Q. I now hand you, Mr. Dimmick, a part of the diagram forming part of the Proclamation dated August 23d, 1910, establishing the Kaibab National Forest in the State of Arizona, [41] with certain mapping and all the references superimposed for the purpose merely of identification and which you may refer to if you desire to do so in answering this question. If there are any others than these you have named, and the form of location, state them.

A. There is Cliff Springs and Greenland Springs that was by permission of the Forest Service, and there was the Bright Angel Spring.

WITNESS.—(Continuing:) As far as I have gone to the present time that is my best recollection without reference to maps or anything else; it is my own independent recollection. Now I am going to refer to the map. There was Little Park lake, by Forest Reserve permission; the Big Park lake, and the Kenabunicks lake. I do not find that on the map. That was held by Forest Reserve permission. All

(Deposition of Charles Dimmick.)

these that I have named were within the Buckskin Mountain ranch or range; there was also the Dry Park lake, Forest Reserve permission; Lookout lake Forest Reserve permission; East Lake, Forest Reserve permission; Joe's Mud Holes, Forest Reserve permission; Mile-and-a-half, Forest Reserve permission; Fracas lake, Forest Reserve permission; Frank's lake, Forest Reserve permission; Basin Springs, Forest Reserve permission; Basin lake Forest Reserve permission; Snipe lake, Forest Reserve permission; Three lakes, scrip, I believe; Jacob's lake, a lake located on a mining claim.

Jacob's lake was made before the mining claim was located, I do not remember when. The lake was excavated just before I went there, but I do not know just when, it was before I took charge of the Buckskin Mountain ranch in 1901; it was about 1900 I presume. The mining claim was either located on it or it on the mining claim. My best recollection is that at least as early as 1900 Jacob's lake was excavated. I do not know when the mining claim was placed on it. [42]

(Witness proceeds answering questions relative to location.) There was Greenland lake, Forest Reserve permission. That is all I can recall on the Buckskin or V. T. On the Kane Beds ranch there was the Kane Beds springs. I do not remember the way it was held or nothing about it; there was a spring developed and a pipe-line about three miles to a tank and trough and a reservoir for stock watering purposes. Canaan reservoir I think all scrip.

(Deposition of Charles Dimmick.)

That is all the watering places on the Kane Beds ranch.

The form of location is supposed to be those here given and not by personal knowledge. I acquired this general knowledge as to the way in which they were held from the Forest officers; they informing me that these permissions had been given. That is, where I refer to the Forest Reserve permission. And in other cases where it is scrip in talking or writing to B. F. Saunders who claimed to have these locations.

The Jacob's lake mineral location was from information obtained from Mr. Saunders. Mr. Saunders is now dead. I obtained this information from Mr. Saunders when I was in his employ as ranch foreman. When I speak of these watering places being held by the Forest Reserve permission, I mean by permit for excavating or necessary work that was done on it. I recall other mineral locations than this mineral claim on Jacob's lake within the Buckskin Mountain range or ranch. There are mineral locations all over it. There were other locations made by Mr. Saunders while I was in his employ. I recall the Alaska—there was water on that in the form of a lake. [43]

Counsel for the defendant objected to the introduction of any evidence with respect to any claims other than the four claims involved in this suit.

The COURT.—I overrule the objection and admit the evidence bearing on the intent with respect to the charge that these patents for the four claims in question were fraudulently obtained. We have not yet

(Deposition of Charles Dimmick.)

reached the point where it is claimed that the Grand Canyon Cattle Company had knowledge of that fraud, but it is admissible as tending to show intent with which Saunders was acting.

To which ruling of the Court counsel for the defendants excepted.

It was thereupon agreed that the testimony relating to claims other than those involved in this question should be deemed to have been objected to, and subject to the same objection and exception, and the additional objection that there is no showing of such a close connection in point of time as to bring the case within the ruling which permits other fraudulent acts to be shown.

WITNESS.—(Continuing:.) “This is the Alaska lode mineral location that I refer to now, the water was in the form of a lake in parts of the year. Part of the year it dries up and part of the year the water is there. The lake is within the boundary of the mineral claim. I recall other mineral claims made by Mr. Saunders than the Jacobs lode and the Alaska lode. There is the Noonday, the Sunset, and the Emmett. The Noonday, Sunset and Emmett mineral claims all had water within the boundaries. I only know of one Noonday lode. I don’t know whether or not it is patented. It is located right east of One-mile Spring. The Noonday lode to which the witness has testified is the unpatented Noonday lode.

The water on the Noonday lode patented had to be developed by tunneling the spring. I had the water

(Deposition of Charles Dimmick.)

developed on that lode by tunneling; it was done under my direction. I am not positive who the men were that did the work on the Noonday lode for me, I think Ernest Duffin. [44] There was not a natural pool on the Sunset lode. That had to be developed also by tunneling. That work was done under my direction and supervision by C. D. Crosbie. There was a mill site in connection with the Sunset claim. There was water on it in the form of a spring; it had to be developed and was developed under my direction the same as the others. C. D. Crosbie did the work. The nature of the development was tunneling. There was water on the Emmett lode in the form of a spring; it had to be developed and it was done under my supervision by C. D. Crosbie. The water from these mineral claims was piped away from them. From the Noonday it was piped into the House Rock pipe-line; from the Sunset mill site it was piped into the Pools line; the Sunset and Emmett were piped together into a reservoir to themselves; that reservoir was about a mile and a half from the mining claims and was used for watering stock. The development work done on the Emmett lode was done by tunneling.

Q. Now, all of this development work, Mr. Dimmick, that you have referred to on the Jacob lode, the Sunset lode and mill site, the Noonday lode and the Emmett lode, was done for the purpose of developing water at these points, was it not?

Mr. STEVENS.—I object to that on the grounds it is incompetent, irrelevant and immaterial, and calls for a conclusion of the witness.

(Deposition of Charles Dimmick.)

Objection overruled, and defendants, Grand Canyon Cattle Company, excepted.

A. That was one purpose, and also for assessment work. I now refer to the Noonday lode, the Sunset lode and Sunset millsite and the Emmett lode. The Jacobs lode had excavation work in the development of water; also had work done for prospecting or development of mineral.

WITNESS—(Continuing:) With reference to the prospecting or development work in prospecting for mineral on the Jacobs lode, some of it was done by me or under my directions, and some of it was not. The part that was not done by me I do not know by whom it was done. It was done before I came there.

[45]

Describing the development work on the Jacobs lode done by me there was one shaft I think about twenty feet deep; that shaft was located on the northwest side of the pool or lake about fifty or one hundred feet from the water. I don't recall whether we got any water in this shaft. The other mineral development I did on this lode was one cut north of the lake; I cannot say the length, probably twenty feet long and three and a half or four feet wide, and in depth from nothing running in five feet. In other words, it drifted into the hills. I cannot say how far away from this cut the shaft was, possibly two hundred feet. It was within the boundaries of the claim. This constitutes all of the mineral development I did on the Jacobs lode.

Describing the mineral development on the Jacobs

(Deposition of Charles Dimmick.)

lode other than what I had done, there was one shaft on the south side, I don't know how deep. When I say on the south side I mean on the south side of the lake possibly twenty-five feet from the lake. There was no water in it. There was no development work on this claim that I know of.

I am not an engineer or a geologist, just a cow puncher. I can't say of my own knowledge whether or not this land included in the Jacobs lode, so-called, or Jacob's lake, contained mineral. I would think it did from the looks of the rock. I saw there practically the same kind of rock as the Petosky and Coconino companies were working. The nearest claims the Petosky and Coconino companies were working would be a half a mile from the Jacobs lode. They claimed they were working copper. They did some work on their claims after I went over to the Buckskin Mountain ranch in 1897, and some before that.

I never knew of any mineral being shipped from the Jacobs lode. There was mineral shipped from the Petosky or Coconino mines to the Coconino mills, shipped from one of their claims and milled there. There was a mill and smelter there. The smelter was erected before I went there, or about that time, and the mill, I believe, in 1902. When I left there they were not continuing business. I think they took the last ore out. I think the mill ran six months and the smelter two different times three or four months at a time, and then they closed down, and up to the time I left there they remained closed down. [46]

(Deposition of Charles Dimmick.)

The pipe for the purpose of piping this water from the different places I have testified to was brought from Marysville, Utah, by Mr. Saunders, and I had it placed and connected it up with the water; that was done under my direction by people working under me. That is not true with reference to the other places where piping was done than the mineral claims I have testified to.

Q. Now, other than the Jacobs lode, the Noonday lode, the Sunset lode and mill site and the Emmett lode, from what other waters were pipe-lines put in under your direction?

Mr. STEVENS.—Objected to as immaterial, incompetent and irrelevant; and also the objection with respect to other claims which runs all through this testimony.

Objection overruled, and defendants, Grand Canyon Cattle Company, excepted.

A. House Rock and Two-mile.

WITNESS.—(Continuing:) When I went there in 1897 I found some pipe-lines already installed by Mr. Saunders. The names of the springs or pools which had already been piped when I arrived there were the South Canyon, Kane Springs, Kane Beds pipe-line and the Pools. In the course of my work from the time of my employment in 1897 on the Buckskin Mountain ranch down to the time the sale was made by Saunders and Haley to the Grand Canyon Cattle Company I had occasion to travel over this Buckskin Mountain ranch and range used by Saunders and Haley all the time. I was practically

(Deposition of Charles Dimmick.)

familiar with the area of the ranch and the quality of the range. It was a fairly good range. With reference to the range in that part of the country it was classed as comparing favorably with it. Saunders and Haley shipped cattle yearly from that place, and they were in fairly good condition when they shipped them, but not good enough for the beef market. The usual custom is they take them off the range and feed and fatten them up before they put them on the market. That is the general custom. I have no idea how many townships were covered by the range incident to this Buckskin Mountain ranch covered by the cattle [47] owned by Saunders and Haley, it was about forty-five miles on the west and forty on the north and sixty on the east and south—triangular shape. And the water supply for the cattle on that ranch was at the points they were testified to me on the mineral claims, and forest permits and the scrip location. Saunders and Haley were also in the sheep business, and ranged their sheep practically all over the United States—that is, in the range country.

The sheep and cattle business was their occupation as far as the partnership was concerned. Haley himself, I think, had other business, but I had nothing to do with that. With reference to the names of places that have been mentioned, what is known as the Jacobs lode has also been referred to as the Jacobs lake ranch. The Noonday lode is east of the One-mile ranch, but near it, about half a mile. The Sunset lode is about a mile and a half east of the

(Deposition of Charles Dimmick.)

Pools. What are known as the North Lake tract and Middle Lake tract and South Lake tract are on what I presume would be lieu selections on what is known as Three Lakes ranch.

The Alaska mill-site location, is, I think, on the Mile-and-a-half ranch, and the Alaska lode location, I think is on Mile-and-a-half. I don't know how far the Alaska mill site is from the Alaska lode, but I am not quite sure that the Alaska lode is on the Mile-and-a-half ranch. I cannot say that there was a mineral location on East lake—I don't know. I do not recall the location known as the Snipe lode, but there was a lake known as the Snipe lake. I recall a lake known as the Franks lake, but do not recall that having a lode location known as Frank's lode. I recall Crane lake, and I recall a location on that. I wouldn't say whether it was the Crane lode, but there was some location on it. I recall that there was a scrip location on Kane ranch, placed by Mr. Saunders. I don't know any of the particulars of that scrip or location.

On the range that I have described by dimensions contained in what is known as the Buckskin Mountain ranch there might possibly be other waters than those I have testified to, but as to that I cannot recall to mind at this time. As a matter of fact water was very scarce in that part of the world at that time. I found it necessary there as ranch foreman to have the development made, and which I have testified to, in order [48] to have sufficient water for the stock. That is the reason I made them. I

(Deposition of Charles Dimmick.)

cannot recollect whether Mr. Saunders either in conversation or in correspondence, stated to me what his purpose was in having this water developed. I recall that I accompanied Mr. John T. Breckon when he was making surveys there at Mr. Saunders' direction one instance I believe was all. The survey that I accompanied him on was the Forest Reserve line. I don't recall any others. I might have gone on some other surveys with him without recalling them now. I understand when I say surveys that I meant the surveys of mining claims or other locations for Mr. Saunders done by Mr. Breckon. I cannot say whether or not the development of water on mineral claims on the Buckskin Mountain ranch by me or people under my direction at Mr. Saunders' suggestion was before the mineral claims were placed there. I do not recall how soon after my arrival on the Buckskin Mountain ranch I first saw the Sunset lode and Sunset mill site. I know of no ore being mined or shipped from the Jacobs lode or the Noon-day lode or the Sunset lode. I do not know of any ore having been stored on the Sunset mill site. I don't know of any ore being mined or shipped from the Emmett lode.

With reference to any mineral claims upon which tunneling was done for the purpose of developing water under my direction and in accordance with instruction from Mr. Saunders, the tunneling for water and assessment work was done at the same time. The cost of the work was estimated in different ways. Sometimes work was done by the

(Deposition of Charles Dimmick.)

day's work, sometimes by contract. I cannot say how much a day was paid laborers for day's work.

I had some correspondence with Mr. Saunders concerning development done for water or for mineral on those claims in a general way. I made reports in full of amount of work done, etc., to Mr. Saunders. These reports were in writing and were made at regular times. It was in accordance with instructions *with* Mr. Saunders that I should report at certain times of the handling of water matters and conditions generally on the ranch, and the instructions I had from Mr. Saunders included [49] instructions to make reports *from* him at certain times for work done in the development of water and with reference to other matters on the ranch. I made that report in the form of a letter and sent it to Mr. Saunders at Salt Lake once a year.

Q. And in these reports you entered into the general situation of handling the entire place?

Mr. STEVENS.—I will object to this question on the ground that these reports are made in writing and the reports are the best evidence.

The COURT.—I sustain the objection for the present, and if the evidence later shows that a diligent search has ever been made to locate these reports the evidence will be admitted.

Q. Did you in any of these yearly reports inform him of the assessment work on the mineral claims having been done under your direction?

Mr. STEVENS.—I make the same objection to that question.

(Deposition of Charles Dimmick.)

The COURT.—I sustain the objection and you may call it to my attention again whenever you have introduced evidence showing diligent search.

WITNESS.—(Continuing:) I am quite distinct, however, in the yearly reports I did report fully on the water developments. Some of the water development work on some of these mineral claims was done under contract. I recall that some of the parties who took these contracts were Ernest Duffin and C. D. Crosbie. Then there was two or three parties from Salt Lake that I don't remember their names. The Salt Lake parties were sent down by Mr. Saunders. Duffin and Crosbie didn't come from Salt Lake. They were not working at the ranch. Duffin lives at Canonville, Utah, and C. D. Crosbie is dead. At the time he was doing this work he lived at Fredonia, Arizona. I think this contract was in writing, and I signed it myself, if it was a written contract. That was at the direction of Mr. Saunders. I have none of these contracts in my possession. They would be sent to Mr. Saunders at the time of completion of the contract at the end of the year, and no copies were kept by me. I have no copies of the yearly reports [50] to Mr. Saunders. I just made out one report and sent it to Mr. Saunders, and don't know of my own knowledge where these reports are at the present time. I cannot recall the terms of any of these contracts with Crosbie and Duffin.

Where men were sent down by Mr. Saunders from Salt Lake to the ranch he fixed the compen-

(Deposition of Charles Dimmick.)

sation. When the work was done under contract and when Mr. Saunders sent men down to the ranch but not under contract, sometimes he fixed the compensation and sometimes I fixed it. There was no particular class of work not under contract where he allowed me to fix the compensation and another particular class where he fixed the compensation. It just happened to occur that way. I cannot recall what the contract price was for this water development work or what any water development work done under my direction cost. I cannot say what the tunneling on the various claims for water cost per foot.

Q. Do you know what was usually paid for tunneling per running foot in that part of the country?

Mr. STEVENS.—I object to that on the ground it is incompetent, irrelevant and immaterial, and that it is too general and that it does not relate to any particular claim in controversy.

Objection overruled, and defendant, Grand Canyon Cattle Company, excepted.

A. I would think about \$4.50 per running foot.

WITNESS.—(Continuing:.) I am not sure about that price, it is a matter of conjecture with me, and I have no distinct recollection of the amount I did pay for that work. I presume the tunneling of these claims done under my direction was done for both water development and for mineral exploration, but I cannot segregate it at this time, and say which was for one and which for the other. My understanding is that the work in each instance, the

(Deposition of Charles Dimmick.)

tunneling, was for the purpose of developing water and mineral with the exception of the Jacobs lode; as to that there was one shaft and cut made for the development of mineral. The other work I do not know. It was done before I went there. I think I executed an affidavit of assessment work on the Jacobs lake claim. I cannot say what became of that affidavit. I cannot recall whether I made any affidavit for assessment work [51] on any other claims for Mr. Saunders, and I think I made only one of these affidavits with reference to the Jacobs lode. Not all of the assessment work that was done on the Jacobs lode under my direction was done at one time. At one time I think the shaft was sunk to a depth of twenty feet, and at one time a cut; that is the shaft and the cut to which I have already testified, but I cannot testify as to the length of time that intervened between the making of the shaft and the cut. I think they were not both made within the same year. The particular thing that fixes the fact in my mind that they were made at different times, is that a person would not do assessment work twice in the same year on a claim. I have a distinct recollection of seeing copper-stained rock on the Jacobs lode after I went to work on the Buckskin Mountain ranch, but I cannot say when the first time was. It was in the form of a rock apart from the rock in the mountain. It would be scattered around. I never examined the shaft and open cut on the Jacobs lode to see if there was any copper-stained rock in place, and cannot state of

(Deposition of Charles Dimmick.)

my own knowledge whether or not the copper-stained rock I saw there came out of the shaft or open cut.

I knew a person down there at the Buckskin Mountain ranch by the name of John Brown; he was in the saw-mill business at Jacobs lake, and was there all the years I was, carrying on this saw-mill business. At one time I employed Brown to assist around the ranch as a carpenter in connection with the water development on the Jacobs lode, building corrals. Brown didn't assist me in doing any excavation work on the Jacobs lode, if he did any work of that kind it was before my time. I had knowledge of Mr. Brown having done excavation work on that lake for Saunders and Haley before my time from the fact that Mr. Brown said so, and from the fact of the work being done.

All the water development work that was done from time to time after I went down there to the Buckskin Mountain ranch to the time of the sale by Saunders and Haley to the Grand Canyon Cattle Company improved the condition of the Buckskin Mountain ranch a great deal. It didn't make it a better range, but it made a better water service and the carrying capacity of the range perhaps three times what it was before.

The Kane Beds ranch practically gives access to a range thirty miles square. The number of cattle we ranged on the Kane Beds ranch varied from one to six thousand head. That one to six thousand head was part of the ten thousand head that was finally sold by Saunders and Haley [52] to the

(Deposition of Charles Dimmick.)

Grand Canyon Cattle Company. I had a person by the name of David Rider working on the Buckskin Mountain ranch working under me, but I cannot recall whether I had him assist Mr. Breckon in the surveying of the Jacobs lode. I don't recall who located the Jacobs lode, I didn't locate it myself. The only development of the Sunset lode for mineral purposes was the tunneling.

There were no other improvements of any kind than those I have already testified to on the Sunset lode. I cannot recall whether I assisted Mr. Breckon in the survey of the Sunset lode. The fact that my name appears as a chain-man on the survey of that lode does not refresh my memory.

I know a person by the name of Young—H. B. Young. He worked on the Buckskin Mountain ranch under me, and I observe his name as one of *axmen* on that survey, but that does not refresh my memory of his having served in that capacity; nor does his name on the affidavit of five hundred dollars improvement on the Sunset lode and mill site refresh my memory as to the cost of the work done there or whether or not I assisted in this survey.

On the Sunset mill site nothing was done for the purpose of equipping it as a mill site more than the development of water. I never saw any ore stored there. I didn't locate the Sunset lode or the mill site. I couldn't say whether I assisted in locating it or not, but I do not recall the time they were located. The tunneling was done on the mill site under my direction and was for the development of

(Deposition of Charles Dimmick.)

water. It was piped away from there and that was done under my direction, and the tunneling on the Sunset lode and piping was done under my direction, and all that developing and piping was done for the purpose of watering stock.

I recall posting notices on the Sunset lode and mill site, and referring to the document entitled "Proof of posting notice and diagram of claim," also on the Jacobs claim, I do not recall whether there was anybody else than myself and Mr. Voice there at that time. When we posted notices on the Jacobs lode Alex Swapp was with us. These notices were [53] posted at the direction of Mr. Saunders. George Voice, whose name appears on the proof of posting notices and diagram of claim, was a man who was working for me on the ranch, and Alex Swapp was at that time working for me on the ranch. I have no recollection of executing a nonmineral affidavit for the Sunset mill site, and the Government's Exhibit 2, entitled "Nonmineral affidavit" does not refresh my recollection.

I observe also the signature of C. D. Crosbie on that same nonmineral affidavit. I recognize there the signature as mine, or a very good copy of it, but I have no distinct recollection of making it. The Sunset mill site is, I should judge, between three-quarters of a mile from the Sunset lode. I have been on the lode and mill site frequently. The character of the ground so far as I observed was the same on the lode and mill site. All work of every kind that I did or had done under my direction on

(Deposition of Charles Dimmick.)

the Sunset lode and Sunset mill site, and all work I ever did in any way was practically under orders from Mr. Saunders, carrying out the general instructions I had from him. The details were left to me or Mr. Breckon, who was sent there by Mr. Saunders. When Mr. Breckon came down from Salt Lake under instructions from Mr. Saunders I couldn't say whether he conferred with me at all times or not. I think I saw Mr. Breckon at each time he was there. I cannot say that he made known to me each time what the purpose of his visit was, but my general recollection is that he talked matters over with me when he came. I gave him such assistance as he needed in carrying on the work under Mr. Saunders' direction. I paid some of the men who assisted Mr. Breckon in these services and Mr. Saunders paid others. Those who were paid by me were the men who were working under me on the Buckskin Mountain ranch. I don't know of my personal knowledge who paid those who were sent down there by Mr. Saunders. I didn't locate the Noonday lode, and don't know who did.

Q. I now call your attention to Government's Exhibit No. 10, and particularly to that part entitled "Final oath for surveys," upon which appears your name and the name of Leroy Breckon, and I will ask you whether or not you recall what work you did in connection with this Noonday lode? [54]

A. I had tunneling done on it; I think about sixty feet, as I remember it.

Q. Was that the tunnel you have already testified

(Deposition of Charles Dimmick.)

about which was done for the purpose of developing water?

Counsel for Grand Canyon Cattle Company objected on the ground that the question assumes a condition of facts not shown to have been testified to by the witness, and puts in the witness' mouth language which he had not formerly used.

Objection overruled and exception taken.

A. Yes, sir.

WITNESS.—(Continuing:) The other work that was done by me or under my direction on this Noonday lode was piping water for the purpose of watering stock. I think there was no particular or unusual kind of piping done in the tunneling or near the mouth of the tunnel on this Noonday lode. I presume there was a perforated standpipe at the mouth of this tunnel, because I had it in all pipelines, and I think in all the tunnels. The purpose of this standpipe was to keep them from clogging up so as to let the water through the pipes that carried the water off from the tunnels.

I know Leroy Breckon; he is John T. Breckon's son. He didn't work under me; he came down with Mr. Breckon from Salt Lake. I didn't pay Leroy Breckon or his father for their work.

There were no improvements of any kind on the Noonday lode other than those I have testified to. This tunneling, which was done for water and which I have set out fully in my testimony concerning the Noonday lode, must have been the same work that was computed as assessment work on the Noonday

(Deposition of Charles Dimmick.)

lode. There was no other work done on there; I never saw any mineral mined or shipped from the Noonday lode. My attention being called to Government's Exhibit 10, and to that particular part entitled "Proof posting notice and diagram" whereon appears the signature of myself and Charles Lewis, I will state that I posted a notice. Charles Lewis was a man in my employment as ranch foreman of the Buckskin Mountain ranch. My signature at the end of the paper to which my attention has just been called is either my signature or a very good copy of it, and I recognize the signature there as that of Charles Lewis. I have no recollection of a party named John M. Ross. I didn't locate the Emmett lode, and don't know who did. [55]

Q. I now call you attention to Government Exhibit No. 11, and especially to that part thereof entitled "Final oath for surveys" whereon appears the names of Leroy Breckon and Charles Dimmick, and I will ask you to look over this exhibit and to refresh your memory and tell us just what you did or had done in connection with the Emmett lode.

A. I did the tunneling and piping, of which I have already stated, and that is all I have any recollection of.

WITNESS.—(Continuing:) There was no other development work of any kind that I recall on the Emmett lode, and the tunneling and piping I have testified about was done for the purpose of developing water, and the water was piped away for the purpose of stock watering. There were no buildings

(Deposition of Charles Dimmick.)

or improvements of any other kind in connection with this Emmett lode.

Referring back to the Jacobs lode, there was cabins built around there other than this sawmill; there was one house of two rooms, one room about 16 by 20, the other about 8 by 20, just used for camp houses, and one 14 by 16 or 14 by 18, used for storing purposes. These were all the buildings that the Jacobs lode had other than the sawmill I have spoken of. The first house I have described was a camp house used by men employed while caring for the cattle on the ranch, and in the storehouses we kept stored anything we might have for storage—salt, groceries, general supplies for ranch use, and amongst them salt for the cattle. There were some groceries around Jacobs Lake, one was a cattle corral and some chutes, there was another small corral there not used for cattle purposes, but used by the sawmill people for catching or handling stock, milch cows or any stock they had around. There was a fence around the lake; I had that put there. That fence was put there for the purpose of handling cattle. It was for the purpose of keeping the cattle from wading into the lake and keeping them over night, and for separating and branding. We put them in there from time to time and kept them over night. There was a well or shaft sunk on the Jacobs lake. The purpose of that was to see whether they could get water or not when the lake was dried up. It was sunk at a time when the lake was dry.

[56]

(Deposition of Charles Dimmick.)

Q. I again call you attention to Government's Exhibit No. 11, and particularly to that point thereof entitled "Proof of posting notice and diagram of claim" whereon appears the names of Charles Dimmick and C. D. Crosbie, and ask you to state whether or not you recall having posted notices on that claim?

A. Yes, sir.

WITNESS.—(Continuing:) I remember posting the notices and I recognize also the signature of C. D. Crosbie. I don't know a person by the name of John J. Hawkins.

The nearest newspaper to the Buckskin Mountain ranch was, I presume, the Coconino Sun at Flagstaff. At times there was a little paper published at Kanab, Utah, about the same distance. It ran a little while and then closed down. I don't know whether the paper was published at Kanab during the years of 1904, 1905 and 1906.

From the time I first went to work on the Buckskin Mountain ranch in 1897 down to the time that Saunders and Haley sold out to the Grand Canyon Company, Mr. Saunders visited the ranch. I think at one time there was two years between his visits. I couldn't say what years they were, but he generally visited once a year. I couldn't say whether this period of two years absence was prior to 1900 or afterwards, but with that exception I think he visited the ranch at least once a year. I don't think he visited the ranch more than once a year. The purpose of these visits was to look over things in general

(Deposition of Charles Dimmick.)

and for a conference with me about the situation and to give me instructions. On these visits he generally stayed about a week, and then went back to Salt Lake. On one of these occasions I think he brought Breckon, but I cannot recall the year, and cannot recall whether it was in connection with the matter of the surveying out the pipe-lines. It surely must have been in connection with some surveys in the Buckskin Mountain ranch that he brought Breckon, but I couldn't say. It was after I was appointed ranch foreman, but I couldn't say whether it was shortly after or considerable after. I don't remember the time he came with Breckon and don't recall any conference with him, and Breckon together. That was the only time he came with Mr. Breckon that I can recall. [57]

When I made payments to men employed by me or working under me for any development they did for water or pipe-lines, I paid them by check on the Commercial National Bank of Salt Lake. I signed those checks myself. There was no fund on deposit against which I might check. I drew a sight draft in every instance on B. F. Saunders. I made such drafts on B. F. Saunders before the time I was appointed ranch foreman, but not on the Commercial National Bank. They were directly on B. F. Saunders, Salt Lake. That was in accordance with instructions given me by Mr. Saunders orally. Those drafts were always paid by Mr. Saunders and the bank. After I was appointed ranch foreman in 1901 on to the sale to the Grand Canyon Cattle

(Deposition of Charles Dimmick.)

Company by Saunders and Haley, I spent practically all of my time on the Buckskin Mountain ranch caring for that business. I have examined in the course of my testimony the map to which my attention was called and which bears the title "Kaibab National Forest, Arizona," and which constitutes a part of the diagram of the proclamation of August 23, 1910. I recognize the claims and the legends on the map as being approximately the locations as I recall them. From the time I was appointed foreman in 1901 to the time of the sale of the Grand Canyon Cattle Company I purchased a part of the supplies that were used on the Buckskin Mountain ranch, and Mr. Saunders made purchases. I think Mr. Saunders and I attended to about everything in the matter of the purchase of the supplies. I presume the bulk of them were purchased by Mr. Saunders. I didn't, in my yearly reports to Mr. Saunders, indicate the amount of supplies that would be needed for the coming year. He ascertained the amount of supplies that would be needed from orders sent to him by me from time to time. Then he would have the order filled out and sent to the railroad and I had it freighted to the ranch. That was not the case on the Kane Beds ranch. That was under different arrangements from ours. There was another foreman for that ranch—different ones there—George Cropper, George Voice and A. H. Kearns. I don't recall any others at present.

George Cropper lives, I presume, at Deseret, Utah. George Voice is dead, and A. H. Karns lives at

(Deposition of Charles Dimmick.)

Gunnison, Utah. They served practically all three during the same time, during the years 1901 to 1907. George Voice worked under me on the Buckskin Mountain ranch from 1902 to 1905, at different times in handling cattle. [58]

On the Alaska lode the developments for water the fixing and improving and fencing and puddling of the lake.

Mr. STEVENS.—I suppose the objection that was offered before should also be understood to run through the entire deposition, with the same ruling.

The COURT.—Yes, the same ruling.

WITNESS.—(Continuing:) The water there was in pool form when it was there. It was only there at times during the year. I don't know anything about the Alaska mill site, but I recall that Alaska lode. The Alaska lode was located near Mile-and-a-half pond or lake. The water on the Alaska lode was developed and used for stock watering purposes. There was no piping away from it. I do not recall the Snipe lode, but I recall the lake known as Snipe lake. I do not recall whether there was a mineral location made on that. I recall that there was development or improvement of Snipe lake for the purpose of watering stock. That was developed practically the same as Mile-and-a-half and Alaska. That is, it was a pond and used for stock watering purposes and no pipe in connection with it.

I recall East lake, and that was developed for stock watering purposes in the same way. It was a natural pool. I don't know whether there was a

(Deposition of Charles Dimmick.)

mineral claim on East lake.

Counsel for the Government states for the information of counsel that the Noonday lode unpatented, is shown by the Government records to be on East lake.

WITNESS.—(Continuing:) I recall Frank lake, or Frank pond. That was a natural pool also, and was developed for stock watering purpose.

I also recall Crane lake; that was a natural pool and developed for stock watering purposes. There was no piping at Frank lake or Crane lake. It was unnecessary. These lakes, namely: Crane, Frank, East, Snipe and Mile-and-a-half lakes, were protected by fences. They were fenced for the purpose of handling stock, the same as Jacobs lake. There was a small cabin at Snipe lake not used for anything. There had been a part of a cabin [59] at East lake. There was a part of a cabin at Alaska lode and Mile-and-a-half. The cabin at Mile-and-a-half was used for camping purposes and for storing salt.

I recall Fracas lake, but I don't recall the location of a mill site at that lake. I don't know of any mining ever having been done or mineral having been shipped from Crane lake or Frank lake or East lake or Mile-and-a-half lake, the Snipe lake or Fracas lake. I knew there was a mineral location on Crane lake, but I am not positive about its being Crade lode. But there was some mineral location on that. I don't know a lake known as North lake on the Buckskin Mountain ranch, nor do I know a couple

(Deposition of Charles Dimmick.)

of lakes known as Middle and South lakes. I know those lakes by the name of Three lakes. I know that Three lakes had scrip placed on them by Mr. Saunders. The development on Three lakes for the purpose of developing water and providing water for stock was practically the same development as the other lakes on the Buckskin Mountain. Those Three lakes were natural pools of water, and the entire three of them covered possibly twenty acres.

Between the time of my going to work on the Buckskin Mountain ranch in 1897 down to the time of the sale to the Grand Canyon Cattle Company, there were improvements made under my direction. A house about twelve by sixteen, a fencing of the entire water. The house was used for storage for such supplies as we needed in that locality. Amongst the supplies, salt for the use of the cattle. There was no piping of any sort or troughs in connection with these Three lakes development.

I know a location known as the Two Mile lieu tract. There was no lake there. The development at this Two Mile lieu tract was a tunnel for waters, piping it, tanking it, reservoiring it and building corrals for the purpose of watering and caring for stock. This was done under Mr. Saunder's direction. At this Two Mile tract there had been some development of water. That was what the tunnel was for. I think the tunnel was about 125 feet. There were buildings about the Two Mile track, a rock house, two rooms, one 12 by 16 and the other 10 by 13. I think that house was used for a camp

(Deposition of Charles Dimmick.)

house and storage house, among other things for the storage of salt for the use of the cattle. [60]

I know another lieu selection known as One Mile tract. The development upon that was tunneling for water and piping for water for the use of cattle. There was about a hundred foot of tunneling on the One Mile tract, and that was done for the purpose of developing water there, and it was piped out to a trough. There was fencing done there under my direction and the development work was done under my direction at the order of Mr. Saunders. There were no buildings on the One Mile tract.

I know a tract known as House Rock lieu tract on the Buckskin Mountain ranch. At House Rock there was a hundred foot tunneling, water piped out, rock house 12 by 14, I believe. Water piped into reservoir and tanks, fencing for watering stock. These developments were made under my direction at the order of Saunders.

I know a lieu selection known as Jacobs pool tract. There was a spring developed there, practically the same as House Rock Spring, and for the same purpose, and some improvements. This piping and tunneling was for the development of water for the use of cattle and was done under my direction at the order of Mr. Saunders.

I knew a person by the name of Murray Averett. He worked under me on the Buckskin Mountain ranch, but I cannot recall the year. It was before the sale by Saunders and Haley of the Buckskin Mountain ranch to the Grand Canyon Cattle Company. He

(Deposition of Charles Dimmick.)

worked under me I should judge about six months in general ranch work. Mr. Averett assisted in the development of these water concerns that I have described in my testimony. Most of his work was on water development.

I know a person by the name of Hinton Syler. He worked under my direction on the Buckskin Mountain ranch, but I don't recall in what year. It was before the sale to the Grand Canyon Cattle Company. Mr. Syler assisted me in the development of these water places.

I know a person by the name of Alf Pardners. He worked under me on the Buckskin Mountain ranch and assisted in the development of the water supplies I have described.

I know a person by the name of Edgar L. Clark. He never worked on the Buckskin Mountain ranch under me. He worked for Saunders and Haley at times in the handling stock, buying and selling stock. He did some work on the Buckskin Mountain, but very little, and not under my direction. [61]

I know a person by the name of Howard Young, or H. B. Young, who worked under me on the Buckskin Mountain ranch and assisted in the development of the water claims described by me.

I know Frank S. Brown. He worked under me and assisted in the water development of the Buckskin Mountain ranch also.

I know a person by the name of D. K. Judd. I don't think he worked under me on the Buckskin Mountain ranch, nor, to the best of my knowledge

(Deposition of Charles Dimmick.)

did he ever work for Saunders and Haley, but I have no distinct recollection on that.

I had authority from Mr. Saunders to employ what hands I needed on the Buckskin Mountain ranch, and I employed them to help out on the ranch and care for the cattle or any way that I needed them.

Q. Your authority in that regard was such that you could employ these people as you needed them on the Buckskin Mountain ranch and arranged the matter of their compensation without reference to Mr. Saunders?

Objected to as irrelevant and immaterial.

Objection overruled, and defendant, Grand Canyon Cattle Company, excepted.

A. Yes, sir.

WITNESS.—(Continuing:) I did so employ them. When I needed supplies I made out requisitions or reports showing what I needed, transmitted them to Mr. Saunders and he turned the order over to somebody, and had the supplies sent down to me. That is, the bulk of supplies. Some I bought direct myself, but when I didn't buy them direct, they were handled in the way I have indicated. Mr. Saunders gave me absolutely free scope in that matter.

All of the testimony I have given with regard to the development of water, the location of improvements, scrip and mineral claims refers to the time prior to the sale to the Grand Canyon Cattle Company, and the conditions I have described in these respects were the conditions that existed prior to that sale.

(Deposition of Frank S. Brown.)

Counsel for the Government then stated that he desired to read the testimony from here on at a later time. [62]

Deposition of Frank S. Brown, for the Government.

Mr. Sheridan then offered and read in evidence the deposition of FRANK S. BROWN, who testified as follows:

My name is Frank S. Brown; I live in Fredonia, Arizona. I am forty-one years old, and my occupation is stock-raising and farming. I have been in that part of the country about thirty years. Fredonia is on the north side of the Grand Canyon. My principal occupation during the time I have lived down there has been just a common laborer, working wherever I could get a job. I have worked in connection with stock-raising prior to the present time. I was engaged in stock-raising in that part of the country as far back as about twenty years ago. I have been in the stock-raising business for the past twenty years. During my work down there in connection with stock-raising and at jobs I became pretty well acquainted with the Buckskin Mountain ranch, formerly belonging to Saunders and Haley, and now claimed by the Grand Canyon Cattle Company. I was acquainted with that country long before Saunders ever bought it, and continued to be familiar with it during Mr. Saunders' ownership, and am familiar with it at the present time. I have met Mr. Saunders at Fredonia, Arizona, my home, just before he bought the Buckskin Mountain property. He bought the remnants of the cattle and

(Deposition of Frank S. Brown.)

also the ranch from Fotheringham. I don't know whether Mr. Fotheringham held the property personally or whether some one was associated with him.

I knew the ranch at the time Fotheringham claimed the places down there, and I was at the time familiar with the watering-places in that part of the country. I have rode every range and been over it for the past twenty years. I am familiar enough with these springs or water places to name some of them—Jacobs lake, Three lakes, Mile-and-a-half, Franks lake, East lake, Snipe lake, Crane lake V. T. Park lake, Greenland, Neill Spring, Bright Angel Spring, Basin Spring, and the Dutchman. When the term lake is used I mean just pools. These places that I have named were all natural pools with the exception of some of the springs I have mentioned. I just gave the names as they are known on the Buckskin Mountain. I don't mean that all those I have named are natural pools; there are some springs and some of these springs have been developed. I [63] believe working on the Buckskin Mountain ranch. Charlie Crosbie was doing the work. He is now dead. I don't know any other person who was working there developing water. With reference to all these watering-places and with reference to the Buckskin Mountain ranch I have seen any mining being done down there at the time it was claimed by Saunders and Haley. I never saw any ore shipped out of there.

I know Charles Dimmick. I met Dimmick prior

(Deposition of Frank S. Brown.)

to the time that Saunders and Haley bought the Buckskin property. It was about 1900 the first acquaintance I had with Dimmick. I continued to be in touch with him from that time on, for three years. During the time I was forest ranger I was working with Dimmick. My work in the Forest Reserve was I had in charge the east side of the mountain and I was connected with Dimmick. Part of my work as Forest Reserve ranger was to look out for the Forest Reserve on the east side of the Buckskin range and I was connected with Mr. Dimmick in that way. I rode the range with him. I knew Mr. Saunders for a long time. During all the time I knew him I never knew him to be engaged in any business other than stock raising.

Q. Did the people down in that part of the country as far as you know of your own personal knowledge regard Mr. Saunders as a stockman or mining man?

Objected to as irrelevant and immaterial and calling for the conclusion of the witness.

Objection sustained, and the Government excepted.

(A. As a stockman.)

WITNESS.—(Continuing:) I was employed by Mr. Dimmick in hauling supplies and such things as freight from Fredonia. That was during the year that Saunders and Haley sold to the Grand Canyon Cattle Company—just when they were turning over the cattle, that was in October. I cannot recall the year. They were delivering the cattle at the time I

(Deposition of Frank S. Brown.)

delivered a load of oats to Dimmick at Three lakes. I didn't meet any of the Grand Canyon Cattle Company down there at that time. I saw them. [64]

I saw Mr. Stevenson and a man I supposed to be Mr. Marshall. I know it was Mr. Stevenson, because Dimmick introduced him to me the next spring, and I recognized him when I was introduced to him that it was Stevenson who was there the fall before. I never had any conversation with Mr. Stevenson about the Buckskin Mountain ranch.

Q. When you rode the range with Mr. Dimmick, what was Mr. Dimmick doing?

Mr. STEVENS.—I object to that question on the ground it calls for the conclusion of the witness, and I object to the answer as not being responsive and as a conclusion of the witness.

Objection sustained by the Court, and the Government then and there excepted.

(A. He was superintendent of the Grand Canyon Cattle Company.)

WITNESS.—(Continuing:) I was well acquainted with him several years before that transfer and rode over the Buckskin Mountain ranch with him.

These watering places that I have named were all within the National Forest as I understood it. I know of other watering places that were claimed by Saunders and Haley outside the Forest Reserve. Some of them were the Two Mile, One Mile, House Rock, The Pools, Soap Creek; I believe that was all. I never saw any mining done by Saunders and Haley

(Deposition of Frank S. Brown.)

on any of these places that I have last named, nothing only the development of water.

(On cross-examination by counsel for the Grand Canyon Cattle Company, the witness testified as follows:)

I have been employed in connection with the stock raising business for about twenty years on a small scale—not very extensive. Later on I was a forest ranger from 1907 until two years ago. I went to work I believe the 15th day of May, 1907. When I was employed as a forest ranger I was engaged in the stock raising business. I had people looking after my cattle interests. [65]

(On redirect examination by Mr. Sheridan, the witness testified as follows:)

My headquarters was on the Kaibab Forest when I was forest ranger, during the summer season at the V. T. Park, the summer headquarters of the Grand Canyon Cattle Company. My station was close to them. During the winter-time I was stationed at House Rock Valley, right along the boundary line of the Forest Reserve. I didn't have any permanent station.

Q. Did you know any other forest rangers down there at that time?

Mr. TULLER.—Objected to as immaterial.

Objection overruled, and the defendant, Grand Canyon Cattle Company, excepted.

A. Yes, sir.

Mr. TULLER.—I make the same objection to the rest of the questions in this deposition.

(Deposition of Frank S. Brown.)

Objection overruled, and the defendant, Grand Canyon Cattle Company, excepted.

(Thereupon further reading of the deposition was continued.)

WITNESS.—(Continuing:) There were D. K. Judd, Charles Mace, William Mace, William Carlow, Raymond Pratt. I knew a forest ranger by the name of Selden F. Harris. He had charge of the Kaibab National Forest for nigh onto a year. I didn't work under him. John H. Clark and James L. Pelton were in charge of the forest when I was working there. Mr. Harris preceded the supervisors under whom I worked. I knew Mr. Pratt.

With reference to all these watering places I have mentioned within the reserve and outside of the reserve, I never during all the time I know that country knew of any mining being done on these watering places, or in the neighborhood of them, only the development of water. [66]

Deposition of D. K. Judd, for the Government.

Counsel for the Government then offered and read in evidence the deposition of D. K. JUDD, in which the witness testified as follows:

My name is D. K. Judd, and I am in the United States Forest Service as ranger, stationed at the Kaibab Forest. I have been stationed there since 1905. During my service as forest ranger on the Kaibab Forest I became acquainted with that part of the country known as the Buckskin Mountain ranch owned by Saunders and Haley formerly, and now

(Deposition of D. K. Judd.)

owned by the Grand Canyon Cattle Company. I have met the people in charge of the Buckskin Mountain ranch. I met Mr. Dimmick. His position there was superintendent at the ranch. I met some of the people working under him shortly after my arrival at the Kaibab Forest in 1905. My duties as forest ranger required me to ride over the country pretty generally. I don't know that I had any conversation with Mr. Dimmick or those working under him as to the extent of the Buckskin Mountain ranch or range. I was familiar with it by reason of my official duties. I had something to do with the reporting and inspection of a number of cattle kept on that ranch by Saunders and Haley, and in that way became familiar with the extent of the ranch, and I have been there since. At no time since I went down there did I know of any mining being done by Saunders and Haley on the Buckskin Mountain ranch. Since I have been there I have been located at nearly all the stations on the Forest Reserve. At one time I was located on the east side, or what is known as the Grand Canyon Cattle Company's ranch. That was after the sale by Saunders and Haley to the Grand Canyon Cattle Company. Prior to the sale by Saunders and Haley the Grand Canyon Cattle Company I was stationed at or near the Buckskin Mountain ranch at Quakingasp, to the east of the line. It was near a water place about five miles from Dry Park. There was no other particular name that the watering place was known by. I don't remember

(Deposition of D. K. Judd.)

exactly when the sale was made by Saunders and Haley to the Grand Canyon Cattle Company. As I remember it was six years ago, or about 1907. [67]

Deposition of Howard B. Young, for the Government.

Counsel for the Government then offered in evidence the deposition of HOWARD B. YOUNG, in which the witness testified as follows:

My name is Howard B. Young, and I live at Kanab, Kane County, Utah. My occupation is a little of everything—farming principally. I have lived in that part of the country all my life; I am now about thirty-four years old. While living down in that part of the country I became acquainted with the ranch known as the Buckskin Mountain ranch. B. F. Saunders owned it at the time I became acquainted with it. I worked for Mr. Saunders in the House Rock Valley and on the Buckskin Mountain doing a little of everything, just kind of a roustabout, driving teams—general ranch work. When I began working the superintendent was John Neill. His successor as superintendent was a man by the name of Majors, and Hammy Kearns followed him as superintendent. Another superintendent during the time I was working on the Saunders and Haley ranch was Charlie Dimmick. When I first began work I was working under Mr. Neill as a ranch man and received a salary of thirty-five dollars per month. While I was employed on the Saunders ranch under Mr. Neill I was called upon to do development work on a number of watering places. Some of them were

(Deposition of Howard B. Young.)

the House Rock, Kane, South Canyon, The Pools, and Emmett Springs.

Q. What kind of work were you doing on these places? A. Just development work.

Q. For the purpose of developing what?

Counsel for Grand Canyon Cattle Company objected as immaterial, irrelevant and incompetent.

Objection overruled and exception taken.

A. Water for watering cattle. What I have said relates to my work under Mr. Neill, and I didn't do any work of that kind under any of the other superintendents until Dimmick took charge. When I worked under Mr. Dimmick on the Saunders ranch I did a little of everything. Hauling salt, working on watering places and corrals. I didn't do any development on any of the watering places under Mr. Dimmick, only just to fix up the spring so water would go through the pipes. The pipes were clogged up and the water would not go through. I assisted in relaying the pipes under Mr. Dimmick. The purpose of these pipes was for watering stock. I never did any mining under Mr. Dimmick. I did a little mining under Mr. Neill at Jacobs lake. The mining work that I did at the Jacobs lake was just running a shaft into the south side of the hill. It was an open cut about fifteen or twenty feet long and about six feet wide, just drifted into the hill. At the farthest point into the [68] hill it was about six feet deep. There was no covering over it. I didn't do any other mining work on Jacobs lode under Mr. Hill. David Rider assisted me during the time I was doing that

(Deposition of Howard B. Young.)

work, he was employed there under Neill, doing team work and a little of everything, just the same as myself. He started in at a salary of thirty-five dollars per month, and that was what he received at the time he was working with me.

Q. So now, as I understand you, at the time this mining work was being done on the Jacobs lode by yourself and David Rider under the direction of Mr. Neill, you were receiving thirty-five dollars a month as a hand on that ranch, and so was David Rider?

Mr. TULLER.—Now, if the Court please, we allowed several questions of this kind to go in, but we object to any evidence as to the salaries of these men were receiving, as being incompetent, irrelevant and immaterial and outside of the issues in this case.

The COURT.—I sustain the objection.

Mr. SHERIDAN.—Note an exception. As I understand it then, we will leave out any testimony as to the cost of the work or any testimony in regard to the value of the development work on these claims.

The COURT.—Yes, about the salary this man was receiving.

(A. Yes, sir.)

(The following testimony was excluded under the above ruling of the Court:

Q. Did you or Rider receive any extra compensation for the work you did on the Jacobs lode—the mining work? A. No, sir.)

WITNESS.—(Continuing:) That was all the mining work I did on the Jacobs lode, and that was done in August, 1902.

(Deposition of Howard B. Young.)

Q. Now, what, if you know, was the purpose of doing that work?

Mr. TULLER.—We object to that as it calls for a conclusion of the witness.

Objection overruled, and the defendant, Grand Canyon Cattle Company, excepted. [69]

Mr. TULLER.—The same objection may be considered to all this testimony I suppose, along this line?

The COURT.—Yes.

A. For the purpose of holding that property there for mining purposes, I guess, as near as I can remember.

WITNESS.—(Continuing:) I don't know as it was for mining—just for the watering of stock. So I wish to correct my answer and say the assessment work was being done to hold the property for the watering of stock. I never saw any mining there other than what I have testified to. I never saw any ore shipped out of that property. I have seen stock around there. They had other improvements on the Jacobs lode, houses and corrals built there for the purpose of handling cattle. I never had any conversation with Mr. Neill at the time this work was being done regarding the work. Mr. Neill gave me instructions concerning this open cut and how big to make it, and what to do with it. Told us to make it so wide and so long.

Q. Now, did you do any mining under Mr. Neill any place else on the Buckskin Mountains or Saun-

(Deposition of Howard B. Young.)

der's and Haley ranch there, than this on the Jacob's lode?

Counsel for Grand Canyon Cattle Company objected on the ground that it is incompetent, irrelevant and immaterial and no authority shown for Mr. Neill, which objection was overruled and exception taken.

A. No, sir.

Q. Did you do any water development at other places?

Counsel for Grand Canyon Cattle Company objected on the ground that the question called for a conclusion of the witness, which objection was overruled and exception taken.

A. Yes.

Q. As I understand you then, all the work you did at the other places which you have mentioned, with the exception of Jacob's lode, was for the purpose of developing water only.

Counsel for Grand Canyon Cattle Company objected to the question as calling for a conclusion of the witness, and as incompetent, irrelevant and immaterial, and no authority shown.

Objection overruled and exception taken.

A. Yes. I didn't have any instructions from Mr. Neill about my work on these other places. He was the overseer. He told us how to put the cuts in the tunnel for the pipes.

Q. Did he say to you at the time this open cut was being done on the Jacobs lode that it was for mining assessment?

(Deposition of Howard B. Young.)

Objected to as incompetent, irrelevant and immaterial.

Objection sustained, and counsel for the Government then and there excepted.

(A. Well, I don't remember now just what he said, that was the understanding I got.)

Q. In other words, it was your understanding that this was to count as assessment work on the mining claim covering Jacobs lode? A. Yes, sir.

Q. And that the purpose of it was as you have testified, to hold the property for stock watering purposes? [70]

Objected to as calling for a conclusion of the witness.

Objection sustained, and counsel for the Government excepted.

(A. Yes, sir.)

WITNESS.—(Continuing:) Ben C. Majors was at one time superintendent of Saunders ranch. I assisted Charles Dimmick in the making of surveys of these watering places; just Kane Spring, One-Mile, House Rock and the Pools, and in the other places I have named I assisted in the fixing the pipes for the purpose of developing water for stock.

I met a person by the name of John T. Breckon, the first time at Marysvale. I met him at the Saunders ranch in May, 1905. He was then on his way to the House Rock Valley. I assisted Mr. Breckon in his work while he was down there. I went from Marysvale with him to the ranch. We went up and

(Deposition of Howard B. Young.)

he surveyed these watering places. He surveyed the Kane first; next the Pools, and from there to House Rock. At Kane I assisted him by holding the tape while he measured around there. When we went to House Rock I drove the team while he and Dimmick chained the pipe-line. I don't know if any of these springs or pools were held under mining claims by Mr. Saunders only this one at Jacobs lode. I was called upon to execute affidavits in connection with the surveys and the work I did there. Kane Springs was one of the watering places. In connection with it I made an affidavit but I don't remember whether I signed just one or two at a time. I don't remember a mineral claim made by Mr. Saunders known as the Sunset lode, but I remember the name of the Sunset mill site. It seems to me that this Kane Spring was located under that name. I would not be certain.

Q. I now call your attention, Mr. Young, to Government's Exhibit No. 2, and to that part thereof entitled, "Affidavit of five hundred dollars improvements," upon which appears the names of Charles Dimmick and H. B. Young. I will ask you to read this affidavit over and see if it will refresh your memory as to the work therein described and the conditions surrounding it.

A. Yes, I remember that as the affidavit I signed at John Brown's residence in Kanab. [71]

WITNESS.—(Continuing:) I was at Kanab, Utah, at the time I signed this affidavit. Charles Dimmick brought it to me to sign. Kanab is about

(Deposition of Howard B. Young.)

fifty miles from the claim that is described here, the Sunset mill site. I worked there in 1902. This affidavit I signed in 1905, so I think the affidavit related to work done in 1902.

Q. What did Mr. Dimmick say to you, if anything, when he brought this affidavit to you to sign?

Mr. STEVENS.—We object to that on the ground it is incompetent, irrelevant and immaterial, and calls for hearsay evidence.

Objection sustained, and the counsel for the Government then and there excepted.

(A. He asked me if I would sign an affidavit that I had done work on that claim and I told him yes.)

Q. Did you read over the affidavit before you signed it?

Mr. TULLER.—The same objection.

Objection overruled and the defendant, Grand Canyon Cattle Company, excepted.

A. No, sir.

Q. You just signed it at the request of Mr. Dimmick, and let it go at that? A. Yes, sir.

Q. You didn't know what it contained?

A. No, sir, I didn't know what it contained.

Q. You didn't know at the time you signed it?

A. I didn't know the full meaning of it at the time. I didn't understand it.

To each of the last three questions the same objection was made by Mr. Tuller, which objections were overruled and the defendant, Grand Canyon Cattle Company, excepted.

(Deposition of Howard B. Young.)

Q. Did Mr. Dimmick in asking you to sign this affidavit say it was for a mining claim that you can recall?

Objected to as irrelevant and incompetent.

Objection sustained, and the Government then and there excepted. [72]

A. No, I can't remember.

Q. Give us just as nearly as you can recall just what he said when he brought the affidavit to you—the substance of what he said.

Objected to as irrelevant and incompetent.

Objection sustained and the Government then and there excepted.

(A. Well, he asked me if I would sign an affidavit that I had done work on certain claims there, and I told him yes. I went right down with him and John Brown to his residence and signed these papers.)

WITNESS.—(Continuing:) Mr. Dimmick didn't say anything to me at the time what the purpose of this affidavit was.

Q. Did you at the time you signed the affidavit know what the purpose of it was.

Mr. TULLER.—Objected to as calling for the conclusion of the witness.

Objection sustained, and counsel for the Government excepted.

(A. Well, the purpose was to hold these claims as watering places.)

Q. Now, it says in this affidavit, Mr. Young, that the labor and improvements made on the Sunset lode and Sunset mill site by the applicants and his gran-

(Deposition of Howard B. Young.)

tors exceeds \$500 in value. Did you at the time you signed this affidavit, or at any time, know that \$500 worth of work had been done by anybody on the Sunset lode and Sunset mill site?

Mr. TELLER.—The same objection.

Objection sustained, and counsel for the Government then and there excepted.

(A. No, sir.)

Q. As a matter of fact all the knowledge you had as to the work done was such work as you did under Mr. Neill for the purpose of developing water? [73]

Mr. TELLER.—The same objection.

Objection overruled, and counsel for the Grand Canyon Cattle Company then and there excepted.

A. Yes, sir.

WITNESS.—(Continuing:) My recollection is not distinct as to where the Sunset lode is located. I heard the name, but I didn't pay any attention to where it was located when I was working for Saunders and Haley. I recall the name of the Sunset mill site, and I did some work there for the purpose of piping out water.

Q. Did you know at the time you were doing that work on the Sunset mill site what that work was being done for?

A. Well, for the purpose of holding the water.

Mr. TULLER.—I move to strike out the answer for the reason that the witness is not in a position to know the purpose of Mr. Saunders and Mr. Haley in having this work done.

(Deposition of Howard B. Young.)

Motion denied, and counsel for the Grand Canyon Cattle Company then and there excepted.

WITNESS.—(Continuing:) I didn't know of any other purpose, with the exception of the open cut on the Jacobs lode I know of no mining work having been done on any of the places I have named. All the work done by me other than Jacobs lode work was for the purpose of developing water.

Q. And all the work which you did on all the places you have named, including Jacobs lode, was done while you were employed as a ranch hand at \$35 per month?

Mr. STEVENS.—I object to that on the same ground as heretofore urged.

Objection sustained, and counsel for the Government then and there excepted.

(A. I worked on the Greenland Spring and developed water there with Charlie Lewis under Dimmick. I was receiving when I did that work \$45 per month, and when I did the work on all the other places I was receiving \$35 per month.) [74]

WITNESS.—(Continuing:) On the Greenland claim the work I did was fixing corrals, troughs and pipe-lines for watering stock. I received no compensation other than my pay of \$45 per month.

Q. Now, Mr. Young, I will hand you Government's Exhibit No. 13, for identification, and ask you to look it over carefully as to the places thereon marked and see if it appears to be a correct presentation of the

(Deposition of Howard B. Young.)

different watering places and mining claims named thereon?

A. Yes, this appears to be correct as far as I know about it.

Mr. SHERIDAN.—I offer this diagram, Government's Exhibit 13, in evidence; it is part of the official diagram which accompanied the President's proclamation dated August 10th, establishing the Kaibab National Forest. The marks on here have all been superimposed.

Diagram received in evidence without objection.

WITNESS.—(Continuing:) (Photograph marked Government's Exhibit No. 15 shown witness.) That is a familiar scene to me. It depicts Jacobs lake. (Photograph marked Government's Exhibit 16 shown witness.) That depicts Jacobs lake.

The COURT.—Jacobs lake then is on the Jacobs lode mining claim?

Mr. SHERIDAN.—Yes, your Honor, that is correct.

WITNESS.—(Continuing:) (Photograph marked Government's Exhibit No. 17, shown the witness.) I recognize that scene; that is Jacobs lake. (Photograph marked Government's Exhibit 18, shown witness.) I recognize that scene; that is Mile-and-a-half. [75]

(Photograph marked Government's Exhibit 19-a and 19-b, shown the witness.) I recognize that panoramic view; that is Jacobs Pools. That is a part of what is called the House Rock Valley. It comes around near the Pools, as I remember it.

(Deposition of Howard B. Young.)

(Witness indicates upon photograph.) The place here is where Jim Emmett piped out into the flat. I don't know whether they called it Emmett Springs or not. Mr. Emmett located two places that I know of and sold one of his claims to the Saunders people.

(Photograph marked Government's Exhibit No. 23, shown the witness.) I don't recognize the excavation that shows on that photograph. I don't recognize it as the cut I made on the Jacobs lode. There were two or three other open cuts made around there larger than the cut I made. They must have been about two hundred yards or more west of the one I worked on. I couldn't be sure whether the one shown in the photograph is one of those or not, with snow on the ground and taken in the winter.

(Photograph marked Government's Exhibit No. 20, shown witness.) I recognize the locality shown there. That is a scene on the Saunders ranch, a part of the House Rock Valley.

(Photograph marked Government's Exhibit No. 21, shown the witness.) I do not recognize that scene there shown.

(Photograph marked Government's Exhibit No. 25, shown the witness.) I recognize that; that is the house there at Jacobs lake.

(Photograph marked Government's Exhibit No. 26, shown the witness.) I know that place all right, but I cannot call its name. This house I don't remember. With that exception the rest of the scene is familiar to me, I wouldn't be sure to call the name of the place, but I recognize it as a scene on the Saunders and

(Deposition of Howard B. Young.)

Haley ranch on the Buckskin Mountain.

Q. Mr. Young, I again call your attention to Government's Exhibit No. 2, and to that part entitled, "Final oaths for survey," upon which appears the names of yourself and Charles Dimmick. I will ask you to look over that final oath for survey, and ask you if you recall by whom this was presented to you for your signature.

A. By Mr. Dimmick. [76]

Q. I observe that it bears date July 21, 1905. Was this final oath for survey presented to you by Mr. Dimmick for signature at the same time he presented to you the affidavit for \$500 improvements on this same claim which you stated you signed at his request?

Mr. STEVENS.—We object to that on the ground it is incompetent, irrelevant and immaterial, and it is not shown that Mr. Dimmick had any authority to engage in a conversation with this man at this time in any way to implicate Saunders and Haley.

Objection overruled, and counsel for defendant, Grand Canyon Cattle Company, then and there excepted.

A. Yes, that is the only time I ever signed papers for Dimmick.

WITNESS.—(Continuing:) That was in 1905 at the home of John T. Brown in Kanab, Utah. The surveys mentioned in this final oath were made on the 26th and 27th of May, 1905. When I was going down with Breckon from Marysville he said he was going down to obtain the title of these claims for Saunders.

(Deposition of Howard B. Young.)

That was on the 20th day of May, 1905, that I started with Mr. Brecken from Marysvale.

Q. In going down from Marysvale to the Buckskin Mountain country in company with Mr. Breckon did you have any conversation with Mr. Breckon about the purpose of the visit?

Mr. STEVENS.—The same objection.

Objection sustained, and counsel for the Government then and there excepted.

(A. No, sir, only that he was to survey these claims and obtain title for Mr. Saunders; that was the understanding I had from him.)

WITNESS.—(Continuing:) Referring to the open cut on which I worked on the Jacobs lode, about which I have already testified, David Rider assisted me in doing that work. No one else assisted except Mr. Neill, he came there and laid off the dimensions, and he was superintendent of the Saunders ranch at that time. I don't recall the young man by the [77] name of Leroy Breckon. He didn't work with me at the time I did this work.

Q. How long did it take yourself and Mr. Rider to make this open cut you have described?

Mr. STEVENS.—This certainly falls within the same objection made during other testimony.

The COURT.—Do you introduce it for any other purpose?

Mr. SHERIDAN.—I do not your Honor; I will contend that is the sole purpose of it.

Objection sustained, and counsel for the Government then and there excepted.

(Deposition of Howard B. Young.)

(A. Well, it seems to me we were working on it three days, not to exceed three days.)

WITNESS.—(Continuing:) When I was in the employ of the Saunders people I was freighting salt from one place to another, and I took part of a load of provisions to House Rock. The hauling of salt for the Saunders people was at different points on the Buckskin Mountain ranch and I hauled supplies down from Marysvale to House Rock. This salt was just used for salting horses and cattle. They kept it at different points—V. T. Park, Jacobs lake, Three lakes, and quite a number of different places on the mountain. They had two houses or cabins used for that purpose. The stock didn't have access to the cabins to get the salt. They put troughs on the places where they could lick it, and other places they put it on the hard ground.

In addition to the \$35 per month I received at one time and \$45 at another, I received also board and lodging. [78]

Deposition of Hinton Siler, for the Government.

Counsel for the Government next offered and read in evidence the deposition of HINTON SILER, who testified as follows:

My name is Hinton Siler, and I live at Alton, Utah. My present occupation is working at anything I can get; any kind of a job. I am forty-three years old. I worked for B. F. Saunders only on the One Mile and House Rock, just in the valley. I worked at two points known as One Mile and House Rock. Charles Dimmick, Mr. Saunders' foreman, employed me to

(Deposition of Hinton Siler.)

work there in 1904, I believe. I went to Jacobs Pool on the 10th of June, 1904, and went to work on the pipe-line. That is the place that is subsequently known as the Pools. I went to work building a pipe-line, digging and laying pipe. That was the first work I was engaged under Mr. Dimmick. The pipe-line was built from the spring to the corral, a distance of four miles. There were about eleven of us working on the line I believe. I was at the Pools until the 4th of July. I began work on the 10th of June and the 5th of July I left the Pools.

Q. What pay did you receive for this work?

Mr. TULLER.—We object to that as immaterial and irrelevant.

Objection sustained, and the Government, by its counsel, then and there excepted.

(A. Thirty-five dollars per month.)

WITNESS.—(Continuing:) I was not engaged in working on the ranch when Mr. Dimmick had me working on the pipe-lines, I was employed especially for pipe-line work. Mr. Dimmick was there off and on while we were building this pipe-line. Mr. Dimmick had a foreman on the job at the time whom he instructed and I worked under that foreman. When we left the Pools we went to House Rock and went to work on the pipe-line there. We came to House Rock from the Pools and went to work building a pipe-line there under the same boss who was under Mr. Dimmick's direction, and worked on that pipe-line ten days. There was about five miles of pipe-line built at House Rock. I didn't help put it all in,

(Deposition of Hinton Siler.)

only worked about ten days on [79] it. That pipeline carried the water out into the valley from the tunnel out to the southwest about five miles, for the purpose of watering cattle. After I left the House Rock I went to work for Charles Crosbie at Two Mile. Charlie Crosbie is now dead. That was one of Mr. Saunders' places Mr. Dimmick employed Mr. Crosbie. The work I was doing under Mr. Crosbie was tunneling for water at the upper tunnel. I don't remember how many feet there was of the tunnel. He took a contract for fifty feet, and did some work over his contract, I don't know how much. The stone in that tunnel was red sandstone. They got water on it and piped it off to the valley as I have testified. Charles Crosbie and myself were the only persons working on that tunnel. I did this work for Crosbie in September, 1904.

I worked at One Mile on the Saunders ranch tunneling for water, under the direction of Charles Dimmick. That was in 1904. We put a tunnel in there sixty feet, under the direction of Mr. Dimmick. We were somewhere in the neighborhood of a month doing it. The rock was of the same character—red sandstone.

We took a contract later on for one hundred feet, and then the next spring we took a contract at the Kane. The contract that we took later on in the winter in 1904 was at One Mile. We did about two hundred feet of tunneling in red sandstone, for the purpose of developing water so we could handle it. They used the water for watering cattle. We came out all right

(Deposition of Hinton Siler.)

on that contract. We went to work on that two hundred-foot tunnel about the 27th of December, and quit about the 15th of April. Alf Partner was with me in that contract. The work was done under the direction of Mr. Dimmick.

After this two hundred-foot tunnel I did other work for the Saunders people at Kane ranch. The stone there was not the same kind of stone that I had worked in before, it was white sandstone, and a flinty, hard stone. On that contract my brother-in-law, James Bennett, worked with me, and we lost on that contract. We came out just about even.

When I went to work under Mr. Crosbie he paid me. In all other cases I have testified about I worked under Mr. Dimmick on a contract [80] arrangement with him. Dimmick paid for these contracts by check drawn on B. F. Saunders—sight drafts, and I cashed them afterwards.

I worked for Charles Crosbie in 1905 at the Emmett Springs.

Q. What were you doing at Emmett Springs for Crosbie?

Mr. STEVENS.—Objected to as immaterial, irrelevant and incompetent.

Objection overruled, and counsel for the defendant, Grand Canyon Cattle Company, then and there excepted.

A. Tunneling for water.

WITNESS.—(Continuing:) Crosbie was doing work for Charles Dimmick. The work was *tunning* in quicksand. I was there pretty near two years on

(Deposition of Hinton Siler.)

that job. That was at Emmett Springs and we were doing the work to get water and got some of it. The water was used for cattle.

Q. During the time that you were doing this water development work, at all these different points concerning which you have testified, under Mr. Crosbie's immediate direction, in every instance, and under the final direction of Mr. Dimmick, did you have any conversation with Mr. Dimmick at any time about the purpose of this contract.

Mr. TULLER.—Objected to as incompetent, irrelevant and immaterial.

Objection sustained, and counsel for the Government then and there excepted.

(A. Nothing only that he was doing it to let the water into the tunnels so he could pipe it out.)

WITNESS.—(Continuing:) The instructions I had in every instance were from Mr. Dimmick. While I worked under Mr. Crosbie I knew it to be a fact that Mr. Crosbie received his instructions from Mr. Dimmick as to the manner in which the work should be done. The piping was a 21½-inch pipe. Near the end at the corral it was reduced to an inch and one-half. None of the pipe there was larger than 21½ inches, and the smallest that was used was an inch and a quarter. [81]

I first became acquainted with Mr. Dimmick in 1904, in June, when I went to work at the Pools. He sent to Kanab for men to go to work on the pipe-line. I was hunting work and I went there to go to work. I had been over the Saunders ranch before that time,

(Deposition of Hinton Siler.)

and the first time I had been on the ranch for five or six years was when I went down. I was there all together from some time in June, 1904, until the end of 1905. During that time I was employed there, as I have testified, on the Saunders ranch, I never saw Mr. Dimmick or Mr. Saunders or any one working under them engaged in mining on the Saunders ranch, and never knew of any ore having been shipped from the Saunders place.

In answer to questions put by counsel for the Government, the witness testified:

The contract price for the various tunnels, except the one last mentioned, was \$2.50 per foot, and on that \$3 per foot; that I received while working under Mr. Crosbie \$1.50 per day and board.

To this testimony counsel for the defendant, Grand Canyon Cattle Company, objected, on the ground that the same was irrelevant and immaterial, and that proof of the cost or value of the work done was incompetent, irrelevant and immaterial, and outside of the issues in this case.

Objection sustained by the Court, and counsel for the Government then and there excepted. [82]

Deposition of Alf Partner, for the Government.

Counsel for the Government then offered and read in evidence the deposition of ALF PARTNER, who testified as follows:

My name is Alf Partner, and I am the same person who has been referred to as Mr. Partners, and also as Mr. Pardners. I am the only one having anywhere near that name anywhere in that vicinity. I live at

(Deposition of Alf Partner.)

Henrieville, Utah, and I do pretty much of everything and anything I can get to do. I have a little stock, a little farm and orchard. I do plastering, and work at sawmills sometimes. I am thirty-seven years old. I was employed to do work on the Saunders and Haley ranch, known as the Buckskin Mountain ranch. I was employed in 1904 at Kane ranch by Charles Dimmick, who was at that time foreman of the Saunders ranch. I done some tunnel work at Kane ranch in 1904—blasting. I don't think I did more than eleven or twelve feet there. Ernest Duffin worked with me on that job.

Mr. STEVENS.—We object to any of the testimony as to doing any of the work, or the use or purposes to which these properties were put, other than the claims in controversy, and particularly the claims covered by scrip on the ground, it is incompetent, irrelevant and immaterial.

The COURT.—I admit the evidence, certain evidence showing their relation to the outside claims, and I exclude evidence as to the value of the improvements on these four claims.

Thereupon counsel for the defendant, Grand Canyon Cattle Company, excepted to the exclusion of evidence relating to claims other than those in controversy, and counsel for the Government excepted to the exclusion of evidence showing the value and cost of the work done on the four claims in controversy, and the other claims concerning which testimony was given.

(Deposition of Alf Partner.)

WITNESS.—(Continuing:) Dimmick gave me instructions personally as to the manner in which this work should be done and he directed the doing of the work in all its particulars. We found water in the Kane tunnel, and [83] it was piped down to the Kane ranch for the purpose of watering stock. I had conversation with Mr. Dimmick as to the purpose for which this tunneling was being done and he said it was for watering stock.

I worked also at the House Rock on the Saunders ranch. Ernest Duffin worked with me. We worked under Dimmick's direction; that was in 1904.

Next after the House Rock we worked at Two Mile.

Q. What work did you do there?

A. Tunnel work.

Q. For what purpose?

Counsel for Grand Canyon Cattle Company objected on the ground that the question calls for the conclusion of the witness, i. e. an expert opinion.

Objection overruled and exception taken.

A. For the purpose of getting water.

Q. And that was done under Mr. Dimmick's direction?

A. Yes. At the Kane we did about eleven feet of tunneling and on the House Rock either fifty or seventy-five feet. At the Kane tunnel we were engaged about two weeks, and at the House Rock tunnel it might be three weeks, or a month. I cannot tell how long at Two Mile. We had to quit on account of a storm which filled the tunnel up.

I also worked at One Mile on the Saunders ranch in

(Deposition of Alf Partner.)

the same year, the latter part of 1904. That work carried us over into 1905. I was employed by Mr. Dimmick for that work and received my instructions from him the same as in other cases.

The witness further testified that the contract price for the several tunnels was \$2.50 per foot for rock work and \$2.75 for timber work; that Dimmick furnished the tools and the witness and Duffin, or Siler, furnished the powder, and that the contractors boarded themselves.

To which testimony the counsel for the Grand Canyon Cattle Company objected on the same ground as to the other evidence as to the cost of the work.

Objection sustained by the Court, and counsel for the Government excepted.

WITNESS.—(Continuing:) In stating that the purpose of this tunnel was to get water, Mr. Dimmick made that statement with reference to all those places where I worked. Duffin assisted me at the Two Mile, and Siler at the One Mile. In any of this tunneling we never failed to get water, and in each instance Mr. Dimmick told us where to put the tunnel in. [84]

Q. Did he say anything to you when you were starting any of these tunnels how much tunneling you should do or whether you should start under any certain conditions?

Mr. TULLER.—Objected to as incompetent and no authority shown on the part of Dimmick to speak for Mr. Saunders in reference to this matter.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

(Deposition of Alf Partner.)

A. He said if I was going in a certain direction he would pass the remark "Do you think you are increasing the water any?" In one place—One Mile, I said, "I don't believe we are increasing the water." He said, "If you are not increasing the water we don't want you to go any further." So we quit there and started another one.

WITNESS.—(Continuing:) I first became acquainted with Mr. Dimmick when I went to the Kane ranch in 1904. I had never been on the Saunders ranch before that time. I was there during part of 1904 and a part of 1905. During the time I was working for Mr. Dimmick on the Saunders ranch I never knew of any mining being done on that ranch by Mr. Saunders or Mr. Dimmick. I never saw any ore shipped out of the Saunders ranch by any one working for Saunders or by Saunders himself.

Q. You were pretty well acquainted with Mr. Dimmick were you not Mr. Partner?

A. Yes, sir.

Q. Did you talk with him frequently about matters while you were at work on the ranch?

A. Every time he came to where I was working we had a conversation.

Q. Did he ever say anything to you about these tunnels you were driving being driven for the purpose of developing the mines?

A. No, sir.

To the last three questions counsel for the defendant, Grand Canyon Cattle Company, objected to as incompetent and immaterial, and as calling for a

(Deposition of John T. Little.)

casual conversation between witness and Mr. Dimmick which would not bind Mr. Saunders in any way.

[85]

Objection sustained, and counsel for the Government then and there excepted.

Deposition of John T. Little, for the Government.

Counsel for the Government next offered and read in evidence the deposition of JOHN T. LITTLE, who testified as follows:

My name is John T. Little, and I reside at Kanab, Utah. I am forty-four years old; my occupation is a little of everything. I work at most any kind of work. I have been on the Saunders ranch, also known as the Buckskin ranch, off and on for twenty years. I have done work on the Saunders ranch before the transfer of the Saunders people to the Grand Canyon Cattle Company. I took a contract in House Rock Valley, I believe it was in 1905. That contract was to build a pipe line. We dug about a mile of trench and layed the pipe along the trench and covered it. Al Anderson made that contract with me. He was foreman under Mr. Dimmick—assistant to Mr. Dimmick. I worked about four days, near as I can remember. This pipe line was built to take water down further in the valley from what is known as House Rock to Lower House Rock for stock purposes.

The witness testified that the contract price for laying the pipe was twenty-five cents per rod, which was objected to on the same ground as other evidence of value or cost of work.

(Deposition of John T. Little.)

Objection sustained, and counsel for the Government excepted.

WITNESS.—(Continuing:) I knew the Saunders ranch to be a stock ranch. I was slightly acquainted with Mr. Dimmick at that time, and know he was the foreman in charge of the ranch.

I have been riding across the country in a general way for twenty years. In some places on the Saunders ranch there was quite a lot of water, and some places it was scarce. When I say quite a lot of water I meant in the form of pools. Some of these pools were called Jacobs lake, Mile-and-a-half, Three Lakes, East lake, Franks lake, Jolly Sinks, Basin, Greenland, Neill Springs. There was quite a number more of them. Neill ranch was a spring. This spring had been fixed up some. There is a spring in the Basin too. These several ponds are all the way from three [86] to four miles apart, some ten and some fifteen; scattered up the mountain. I don't believe there are any running streams on the mountains where the company's cattle run. It is a pretty good ranch up there when there is a good year for grazing.

I know where Jacobs lake is, that is on the Saunders ranch. I think that is about seven miles from the nearest water.

Q. Did you know of it being a watering place before the Saunders people got hold of it?

Mr. STEVENS.—Objected to as too general, irrelevant and immaterial.

(Deposition of John T. Little.)

Objection sustained, and counsel for the Government excepted.

(A. Yes, sir.)

WITNESS.—(Continuing:) Some of the time it was claimed by parties on the Buckskin Mountain. It seems everybody watered there—a public watering place.

Q. It had that reputation in the community?

Objected to on the same grounds.

Objection sustained, and counsel for the Government excepted.

(A. Yes.)

WITNESS.—(Continuing:) I was not there very frequently after the Saunders people got hold of it. During the time I have known the Saunders people, that they had the Saunders ranch, otherwise referred to as the Buckskin Mountain ranch, I never knew of Mr. Dimmick or Mr. Saunders or any of the people working under them being engaged in mining on the Saunders ranch. I never heard of any ore being shipped from the Saunders ranch.

I have never seen any work done on Jacobs lode at Jacobs lake. I seen a place where they said they had done some work. That was just a cut in the hill. I worked near Jacobs lake on the Coconino mines, and at the Petosky mill, and I have done a little prospecting. I have seen some cuts run at Jacob's lode a great deal like they do in the mines. I never saw any people working on Jacob's lode as a mine, and never saw any ore shipped from them. I never saw any ore there. The improvements at Jacobs

(Deposition of Donald Millett.)

lake seemed to be for the convenience of the cattle company. They had a corral for cattle, and salt.
[87]

Deposition of Donald Millett, for the Government.

Counsel for the Government next offered and read in evidence the deposition of DONALD MILLETT, who testified as follows:

My name is Donald Millett, and I live at Kanab, Utah. My occupation is dry farming. I am twenty-seven years old. I have lived at Kanab and in that part of the country about thirteen years. During that time I have been engaged as a laborer, just working out. In the course of my experience in that part of the country I became acquainted with Charles Dimmick about the year 1904. Mr. Dimmick at that time was foreman on the Bar Z ranch, also known as the Buckskin Mountain ranch. I had occasion to go over that ranch and country pretty generally when I lived out there, and was fairly well acquainted with the Buckskin Mountain ranch and the size and location of it. The Buckskin Mountain ranch and the range on which the Saunders cattle run was about one hundred miles long and fifty miles wide. Pretty good grade of range. There is water on it in the form of lakes—that is, pools and springs. During my traveling through that part of the country and riding over it I have had occasion to visit a considerable number of these springs and pools.

Q. What was the best known spring or pool down in that part of the country?

(Deposition of Donald Millett.)

Mr. TULLER.—Objected to as calling for the conclusion of the witness, and wholly immaterial and irrelevant.

Objection sustained and counsel for the Government excepted.

(A. I believe Three lakes had the most water in it.)

WITNESS.—(Continuing :) Three lakes had been known for a great number of years as a watering place.

I know a place known as Jacobs lake. That was pretty well known as a watering place and had been known as far back as I remember.

Mr. Saunders was in the cattle business in the Buckskin Mountain country. I never knew him to be in the mining business. I never saw any mining done on the Saunders ranch, and never heard of any ore being shipped out of there. [88]

Of the pools and springs I have spoken of, some of them might be one hundred fifty or two hundred yards across. Those were the largest ones, and they went down to fifty or one hundred yards. There were dry and flood periods in them. I have seen them when the water was out of them. I think some of them dried up. I have seen them very low. All these springs and pools I visited appeared to be used just for watering cattle. There were lots of cattle tracks and cattle watering around there, and corrals around the place. So far as I observed the appearance of these springs and pools impressed me as being stock range rather than mining camps.

Deposition of James S. Emett, for the Government.

Counsel for the Government then offered and read in evidence the deposition of JAMES S. EMETT, who testified as follows:

My name is James S. Emett, and I reside at Kinkley, Millard County, Utah. I am sixty-three years old and my occupation is farming. I lived at Lee's Ferry, in Arizona, on the north side of the Colorado River, for twelve years. I left there five years ago. During the time I was there I became acquainted with Mr. B. F. Saunders, and with the people in charge of the Buckskin Mountain ranch, then owned by Saunders and Haley. When I first went there a man by the name of Neill was foreman of that ranch. At the time I left there Charles Dimmick was foreman. In the course of my acquaintance with the Buckskin Mountain ranch and Mr. Dimmick I became acquainted with Edgar L. Clark. I was acquainted with him all the time I lived at Lees Ferry. I had dealings with him concerning water holes in the House Rock Valley. I located a spring called the Emett spring, and sold it to him for seventy-five dollars. I located that spring for watering cattle and sold it to him for seventy-five dollars. I cannot say how long I had my water location on that spring; it was some few months. I never noticed any mineral on that spring location. The formation that I found there was red sand rock.

Q. Did you have any conversation with Edgar L. Clark at the time you sold to him other than just what you have given us when you sold the spring to

(Deposition of James S. Emett.)

him for seventy-five dollars? [89]

Mr. TULLER.—Object to that question on the ground it is immaterial and irrelevant.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

A. He made the remark to me that he very much regretted that he hadn't got it a few days sooner. I think, if my memory serves me right, that the day had passed on which he had placed scrip on it.

WITNESS.—(Continuing:) He stated why it was that he regretted he didn't get it sooner, and that was that they would place scrip on it if he had gotten it a day or so sooner.

Mr. TULLER.—The same objection, and to all the conversation with Clark.

WITNESS.—(Continuing:) Subsequently to selling out the spring to him I went back in that part of the country. I met two men who were there working. They were Charley Crosbie and Billy Tracy. They were developing water; they were tunneling and timbering, and said they were developing water. They told me that the claim was located for mineral, and I asked them if they found any mineral, and they said there was mineral in all that country. No one else was there by those two men at the time. They were working for the Saunders Company under the direction of Dimmick.

Edgar L. Clark was associated with Mr. Saunders. He was buying cattle for them. He bought the spring from me for Mr. Saunders, and so stated when he purchased the property. I think it was

(Deposition of James S. Emett.)

about three years before I left the Lees Ferry country that I sold this spring to Clark and I left there about 1908. When I went back there and saw Crosbie and Tracy working, it was about a year after I had sold out the spring. It was about 1900.

Q. Now, Mr. Emett, if you desire to add anything further about your conversation with the parties, Crosbie and Tracy, you may do so. [90]

Objected to as incompetent, irrelevant and immaterial, and that the declarations of an agent are incompetent to prove the agency.

Objection sustained, and counsel for the Government excepted.

(A. The question arose as to the mode of developing the water. It was at the foot of a steep mountain where the sand had blown in and covered up the water. Their idea was to make a cut across, which would be less expensive and keep the water from running into the quicksand. They said Dimmick's idea was to carry on the work the way they were doing it; to tunnel in and timber it. Through this means I understood they were working under the direction of Dimmick and not following their own idea. They had to do it the way Dimmick wanted it and follow his direction. I understood they were working for Saunders and they so stated to me.)

Deposition of W. L. Walker, for the Government.

Counsel for the Government next offered and read in evidence the deposition of W. L. WALKER, who testified as follows:

My name is W. L. Walker, and I live at the pres-

(Deposition of W. L. Walker.)

ent in San Francisco. My present occupation is geologist with the Associated Oil Company. Prior to my employment by the Associated Oil Company I was in the Government service; with the General Land Office as Mineral Inspector. I served in that capacity about five years. My appointment to that position was based on a civil service examination for the position with the geological survey as assistant geologist, and the qualifications necessary for the work I performed were those ordinarily required for mining engineering practice. I am a mining engineer by profession and a graduate of Leland Stanford University of California, holding the degree of A. B. given by the Department of Geology and Mining.

My duties in the service of the General Land Office as mineral inspector consisted in the examination in the field of mining claims and other claims upon the public domain with reference to their characteristics [91] from a mineral standpoint as to whether they were mineral land and it also included the office work attendant upon the formation of reports covering my field assignments. I was so engaged during the five years that I served the Government.

While in the service of the Government I conducted mineral examinations in Montana, Idaho, Wyoming, Utah and Arizona, and while still with the Government, but with another department, I also made examinations in New Mexico, California and

(Deposition of W. L. Walker.)

Wyoming. When I say in another department I meant the geological survey and in my work in that department I was officially known as field assistant. My work was geological work, having to do with the examination of mineral claims and deposits. I entered the Government service in 1905, and was transferred to the general land office in 1907, and resigned from the latter in 1912. When I first entered the Government service it was in the geological survey. My service with the Associated Oil Company has consisted in the past of field examination, geological examination with reference to the occurrence and production of oil in the State of California, and connected with that has been the preparation of reports with reference to the probabilities of oil occurrence, as to the probabilities of commercial quantities of oil, and advise for or against the purchase of property for all purposes.

In the summer of 1903 I was at work in the mines of California practicing in the capacity of assayer, and in 1904 I was in somewhat similar work, also in California.

While I was in the service of the General Land Office of the United States I was called upon to make an examination of certain claims held by B. F. Saunders. I made these examinations under the instructions of Mr. George E. Hair, Chief of the Tenth Field Division of the General Land Office, headquartered at Salt Lake City, Utah. I made a report to the Commissioner of the General Land Office, but

(Deposition of W. L. Walker.)

through Mr. Hair, showing the result of such examination at the time of making these examinations I made notes on the occasion of each examination.

[92]

Q. I wish you would take up in chronological order the claims which you examined that were claimed by the defendant, B. F. Saunders, or by Saunders and Haley, and give us the result of your examination in detail as regards improvements, development, and the manner in which these claims were held, and I desire this question to include also any claims formerly owned by Saunders or Saunders and Haley, and which were subsequently transferred to the Grand Canyon Cattle Company.

Mr. STEVENS.—It appears that this investigation was made in 1908 after patent was issued. The question to be considered in this case is the good faith of Mr. Saunders at the time the application for patent was made. I object to it as incompetent.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

A. The first examination that I made was of the Jacob Lode, patented lode claim. This examination was made in 1908, in company with Mr. Joseph Jensen, now present, and also connected with the General Land Office.

At that an inspection was made of the claim, and general notes and observations made of the conditions in the vicinity and surrounding country. The claim was found to lie upon the surface of Kaibab plateau, some thirty miles from the settlement of

(Deposition of W. L. Walker.)

Fredonia, Arizona, and a much further distance from railway connections, Fredonia having been reached by cross-country travel. The examination was made in pursuance to my usual methods, attention being given to everything that seemed any way to affect the validity of the claim. The plat of the surveyor general, prepared as the official plat of the mineral survey, was in hand, and the claim was identified by comparison with the objects indicated upon the plat. Attention was given [93] to the improvements called for by the official survey. The examination was made of these individually, where possible. Sketches or sketch survey was carried on by Mr. Jensen and myself and a sketch plat prepared showing the objects we found upon the claim in the way of improvements on the land. I found the claim to be located covering Jacobs lake, including certain corrals which had been built about the lake, a sawmill, several dwelling cabins, and such incidental similar objects as had been used in connection with the operation of the sawmill. There was also a large pipe of sawdust adjacent to the mill, with scattering slabs, and other refuse from the mill. It was observed, particularly on the northern end of the claim, that there was more or less timber of the character common to Kaibab plateau, or Buckskin Mountain, as otherwise known. The formation observed on the surface of the claim was essentially a quartzite with fragments of sandstone and soil generally covering the solid rock. The discovery point, as indicated by the official plot, was visited, and the cut

(Deposition of W. L. Walker.)

which had been excavated on the ground near this point was very carefully examined. I found at that place that the exposed formation was of a quartzite character showing practically horizontal bedding with no evidence of any material fracturing such as is sometimes noted in cases of typical mineral occurrence. No evidence of any mineral of value was shown by the rock in place in this cut. I speak of no value because of the fact that geologically the constituents of rock are minerals, and I mean by my former statement that no mineral of economic value was noted at this point. In fact, during my whole examination of this claim I did not observe any valuable mineral in rock in place, and there were no features that gave visible evidence of the occupancy of the land for mining purposes; in fact, the conditions as noted indicated its occupancy for purposes materially different than those of mining.

My next visit to this portion of the country was in 1910. The first claim visited at this later date was that known as the Crane lode, covering Crane lake. This is also upon the surface of the Kaibab [94] plateau, and its general structural and geological relations are similar to those present at the Jacobs lake. The same close scrutiny was given to the occurrences upon this claim of natural objects or those constructed by the hand of man.

I should correct myself at this point by stating that the lode to which I referred is the John F. Neill lode location, but commonly called the Crane lode, it being that situated at and covering Crane lake.

(Deposition of W. L. Walker.)

It was commonly known as Crane lode, or Crane lake property, but according to the location notice I think it was described as the John F. Neill lode. I visited the location monument on this claim at a point about two hundred feet south of Crane lake, and found a location notice there bearing the name of B. F. Saunders, describing the claim as the John F. Neill lode. In the central part of the claim is Crane lake surrounded by stock corrals as in the case of the Jacobs lode. Three small cabins were found to be situated on the south side of the lake, and the southerly portion of the claim had low, rolling hills, with a limited amount of intervening valley between these hills and those farther west.

The formation upon this claim was found to be of the same sedimentary character as observed at Jacobs lake. Limestone was also noted, but nowhere upon this claim did I observe any deposit of mineral in rock in place; in fact the observations at that time made gave no indications of the occupancy of this area for mining purposes.

Mr. TULLER.—I move to strike out the part of the answer beginning with the words “there were no features” on the ground it’s a conclusion of the witness with reference to the time. This is after the location of the claims.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted. [95]

The COURT.—These applications were made in 1906 and 1907, were they not?

(Deposition of W. L. Walker.)

Mr. BENNETT.—The locations were made before that, in 1905.

Mr. TULLER.—August 8th, 1904.

The COURT.—And patent was issued March 18th, 1907.

Mr. TULLER.—I am also going to make the objection that it covers a claim not at issue in this case rather than an objection to the question, and I move to strike out that part of the answer.

The COURT.—This Crane lode is one of the unpatented entries?

Mr. SHERIDAN.—Yes, sir, one of those of which we have offered evidence to show the intent of Saunders with relation to the other claims.

The COURT.—Motion denied.

Counsel for the Grand Canyon Cattle Company excepted.

WITNESS.—(Continuing:) At the time I made the examination there was a cabin on the claim in which was salt.

On this Crane lake there was water in the form of a natural pool occupying one of the natural sinks that are peculiar to that portion of the country. In fact, a number of these claims to which I will later refer are similarly situated; that is, enclosing what are termed lakes, but which more accurately may be described as ponds in natural depressions on the surface of the Buckskin Mountain.

(It was stipulated between counsel that wherever the Crane lode is referred to by Mr. Walker it shall be understood to refer to the same claim also referred

(Deposition of W. L. Walker.)

to by him as the John F. Neill lode, which designation was observed on the location on this by Mr. Walker at the time of his examination, and vice versa.) [96]

WITNESS.—(Continuing:) From Crane lake I proceeded to Frank's lake. I found the Frank lode to cover another one of these small lakes or ponds occupying one of these depressions in the Kaibab plateau. The geological structure of this lode claim was found to be similar to that I have before described as occurring at Crane and Jacob's lodes. That is, the formation is sedimentary and approximately horizontal bedding; some fossiliferous sandy limestone and sand stone was observed at this point, but at no point did I observe the presence of mineral in rock in place, nor were there any mining improvements such as tunnels or shafts. I observed a cabin upon this claim of dimensions about 14x16 feet, six logs high, with vertical board gables, board roof, similar to that at Crane lake. There was a corral about this lake as in the case of others heretofore described.

I first made the examination of Jacobs lode in the latter part of October, 1908; and my second visit was also in the month of October, in 1910. The Crane lake was examined by me in 1910, and that is also true of Frank's lake. The visit to East lake was in 1910 also.

The next claim inspected was East lake, that covering East lake, and referred to as Noon Day. That

(Deposition of W. L. Walker.)

is the unpatented Noonday claim. It is located at East lake on top of the Buckskin Mountain.

The conditions at this point were similar to those observed at the claims heretofore described, East lake being a small pond occupying one of the natural depressions and being surrounded by corrals and fences. At this point there were two corral fences, the inner one of the two concentric fences being the older one and essentially in a dilapidated condition; the outer one being the newer and in a condition of repair. There was a cabin near the edge of the lake of dimensions of about 12x14 feet, board floor, with one door, no window opening, a pole and board roof, and unoccupied. Geologically, the formation at this point was found to be similar to that at the other lakes heretofore described, quartzite rock being noted on the edges of the natural depression which forms the lake. The bedding here was also essentially horizontal. No mining improvements of a character such as tunneling or shafting or excavations were noted [97] upon this claim, and I did not see and could not find any evidence of the presence of mineral in rock in place at this point. There was nothing to indicate any attempted mining operations thereon. I did observe a rock monument used in the location of the claim, and certain bearing trees which had also been used by the surveyor.

The next claim inspected was the Snipe lode at Snipe lake; this examination also being made in October, 1910. Snipe lode were found to be very similar to those heretofore described at the other lodes, the

(Deposition of W. L. Walker.)

claim covering what is known as Snipe lake, a small pond situated in one of these natural depressions. The lake is surrounded by corral fences as at the other lakes. There was also a cabin at the edge of the lake of dimensions 12x16 feet, of log construction; had a shake roof; a roof extension forming a porch; there was a board floor, one door opening, no openings for windows. It was in a dilapidated condition. I found a well excavation at the southerly edge of the lake about five or six feet deep, rocked up. The formation was similar to that described heretofore, being of sedimentary origin, solid rock being generally hidden from view by surface float wherein I observed quartzite or short particles. The only other excavations I noted were three very shallow depressions about 2x4 feet in dimensions and six inches deep in soil. These were of no particular importance, except that they were evidently the work of man at some time or other. The contour of the country here is more gentle than at Frank's lake and at East lake; that is, the rim of the basin is not so high above the level of the lake. No mining operations were under way, nor were there any evidences of any in the past, and there was no showing of mineral in rock in place upon the claim.

I referred to a well near the edge of the pool or lake some five feet deep and walled up with rock; there was a frame or box upon the well right at the edge of the lake. I do not remember whether it had the above-ground box construction.

(Deposition of W. L. Walker.)

From what I observed and from my present recollection I am sure it was a well rather than a mining excavation. It was just a shallow affair dug in alluvium that fills the bottom of this depression, not solid rock; right at the edge of the lake. It served no useful purpose in mining [98] improvements. From all the appearance of these improvements—corrals, etc., about this lake there was nothing that showed that the location had been used at any time for mining purposes. The first claim inspected—this was October, 1910, was the Alaska lode location at Mile-and-a-Half lake. This lake is surrounded by a five-sided corral fence, the lake being in one of the depressions which I have noted as occurring on the top of Buckskin Mountain. Geologically, it is situated similarly to the lakes heretofore described. The formation is of sedimentary origin; the bedding is essentially horizontal. Rock in place is generally at this point covered by soil and fragmental debris from the adjacent hills. I observed a cabin here of dimensions about 14x14, built of logs, board roof, porch, door and window. I observed at a point about 150 feet distant from the rock monument on this claim a hole about 3x5 feet by 4 feet deep constructed or dug in soil in a small, dry mud basin. I also observed another hole which bears from corner No. 4, south, 11 degrees west. This was a caved hole about 6x8 feet by 4½ or 5 feet deep, dug in pinkish to yellow soil or debris, showing small, angular rock fragments. This was covered by some poles, but the poles were removed and the pit was examined. The

(Deposition of W. L. Walker.)

rock fragments are quartzite of a character common in this section of the country. No rock in place was shown in either one of these excavations. They did not show the presence of any mineral of economic value, and the claim as a whole is without even indications of the presence of mineral in rock in place. About 35 or 40 feet southeast of the last pit I have described was another essentially similar to the first, of dimensions 8x8 by 3 feet deep. There were no evidences of any mining operations being carried on or having been carried on on this tract.

With reference to the Jacobs lake, Crane lode, Frank's lode, Noon Day lode on East lake, Snipe lode and Alaska lode, the water that I observed on all of these claims in each and every instance was included within the boundaries of the mining claim.

[99]

In the case of the Crane lode the corrals surrounding the lake extended a few feet beyond the side line of the claim, and the high-water mark of the lake came right to the edge of the claim. Aside from that, my answer is yes.

I didn't go over to the Alaska mill site from the Alaska lode. We proceeded to Jacobs lake, this being the first visit at Jacobs lake on the trip in 1910. The Forest officers made an examination of the Jacobs lode at this time, and I made a re-examination, making use of my time for a further inspection of the claim which I had visited in 1908.

When I say forest officers, I mean Mr. B. L. Wheeler, Mr. T. C. Hoyt, and Mr. Scott Brown, who

(Deposition of W. L. Walker.)

were with us at that time. Mr. Wheeler, held the position of mineral examiner in the forest service at that time. Mr. Hoyt, I believe, was, at that time, Assistant District Forester, and Mr. Brown, I believe, was a ranger in the Forest Service.

At this time I again inspected a cut on the north side of Jacobs lake. Also the sawdust put beneath the saw-mill, and a small, shallow shaft on the south side of the lake, and the claim in general. From Jacobs I proceeded with the party into House Rock Valley, leaving what I have heretofore termed the Buckskin Mountains. The first claim inspected was that at Two-mile, which we referred to as the Two-mile tract, the same being a lieu selection situated at a point about two miles north of the upper House Rock. This was in October, 1910, also.

This tract lies at the eastern edge of House Rock Valley in sand stone, the formation next about that heretofore mentioned on the Buckskin Mountains. Although geologically above the surface of Buckskin Mountains, topographically it is of lower elevation due to folding of the strata downward to the east of Buckskin Mountains. The claim is crossed by a small ravine or wash and its tributaries, and the claim covers a portion of the hills or cliffs which border this ravine. I visited the various tunnels, and a house and corrals and a pond which I found upon or adjacent to the tract. Near the northeast corner there is a tunnel caved [100] near the portal, and also at a point about one hundred fifty feet distant from the first tunnel was a second tunnel

(Deposition of W. L. Walker.)

about ten feet long with water standing in a pool on the floor of the same. A pipe was observed to run out from the first-mentioned tunnel also. I did not observe the length of the first tunnel; due to caving the entire length of this tunnel was not ascertained. I have not made a note of whether or not a pipe-line run out from the second tunnel—the one about ten feet long.

One of the houses on the claim was built of logs, board floor; dimensions 12x14 feet, and unoccupied. There was a stone house 16x32 feet; shingle roof; salt in the open east room of the house; the rest of the house was locked up. Over on the western edge of the tract there was a pond of water within a corral fence. The difference between this and the other ponds which I have heretofore mentioned arises from the fact that this is not in the nature of a depression such as the others, but that it is an artificially constructed pond fed by waters from the tunnels which I have described on the eastern edge of the tract.

The water from these tunnels was conducted to this artificial pond by pipe-lines. According to the description this tract was approximately 1320 feet square, being a forty-acre subdivision—an ordinary forty-acre lieu selection. These were the only developments I observed on this Two-mile tract. I might mention that I observed a small spring also on one of the branches, off to the east end of this tract. I did not mention it when I was describing the tract.

(Deposition of W. L. Walker.)

I do not recall whether it was developed in any way. I have simply mentioned it as a small spring. From the Two-mile tract I proceeded to the Noonday lode, this being the patented Noonday lode, situated at what is known as One-mile; this being to the south of the afore-mentioned Two-mile.

I might state that the terms One-mile and Two-mile referred to are place names. At this One-mile locality we ran a survey from the corner of the One-mile lieu selection tract over to the Noonday patented lode. [101] During the course of the examination we visited the land monument No. 5. This claim lies in a very rocky, rugged country on the face of the cliffs at the east side of House Rock Valley, and contains no land that could be described as agricultural land.

This description that I refer to applies to the Noonday lode. The formation is of sedimentary origin, the rock being sand stone of a reddish color. I visited Tunnel No. 1, so described by the official survey, and found the same to be constructed in red-sandstone, having three sets of timbers at the portal, lagged with cedar posts, the rest of the tunnel being untimbered, and it was partially filled through the last half of its length by caving material. Water was trickling into this tunnel from the pipe which pierced its roof or top and which led from Tunnel No. 2. Near the floor of this Tunnel No. 1, there was a vertical piece of perforated intake pipe through which water was flowing into a pipe-line which led down the hill towards the valley. There was

(Deposition of W. L. Walker.)

six inches of water in the bottom through a portion of this tunnel. I inspected the tunnel and saw no indication of mineral in rock in place. Tunnel No. 2 was found to be about fifteen or sixteen feet higher in elevation than Tunnel No. 1, and the portals of the two tunnels are only a short distance apart. This Tunnel No. 2 is excavated in horizontally bedded sandstone, the prevailing color being red. There was no vein or mineral matter exposed in this tunnel, and in the interior of the tunnel there was nothing to show any changed condition from the general country rock pierced by the tunnel; in fact there was nothing that invited even a sample. No mineral matter was to be seen.

Tunnel No. 1 was sixty-six feet in all, measuring from the outer end of the open cut. Tunnel No. 2 was forty-six feet with an 18-foot open cut. In Tunnel No. 2 I found a trickling of water entering the tunnel from near the roof at the center, and this water was being led to Tunnel No. 1 as I have mentioned, and from Tunnel No. 1 it was piped on down towards the valley. At this same time an inspection was made of the One-mile tract in lieu selection near by this Noonday lode. The conditions on it were in general similar to those on the lode, except that it was in the [102] valley and the surface was comparatively level, whereas the Noonday lode the surface was very rugged; and the surface and material on the lieu selection tract was in larger proportion soil, whereas on the lode claim solid rock in place prevailed.

(Deposition of W. L. Walker.)

I do not recall that I observed any water on the One-mile lieu tract.

The next claim examined was the Jacobs Pools tract at Jacobs Pools on the east edge of House Rock Valley several miles south of the last-mentioned One-mile tract.

The Noonday lode which I have already described was examined in October, 1910, and the Jacobs Pools was also examined in 1910. That is sometimes referred to as the Pools.

The country wherein this tract lies shows a formation of sandstone and softer clays of rather brownish red colors, and considerable water has been developed in this vicinity. There is a rather large reservoir here and pipe-lines leading down from the springs further up to the east. That is about all that can be said about this tract. It is very similar in general conditions to the One-mile tract and Two-mile tract. I do not know whether it was held as a lieu selection at that time. I could not be sure as to the character of title at that time. I observed some pipe-lines there leading to a reservoir. I didn't follow them up to see where they came from throughout all the distance.

I followed the pipe-line from some distance, but I do not recall now. I did follow it up towards the east and north, towards the springs of water. The next examination was that of the Sunset mill site, survey 2118-B. This was south from The Pools, and which is included in the patented Sunset lode.

(Deposition of W. L. Walker.)

The country included within this tract is rough and hilly, and through the central part of the tract there is a ravine, and in this ravine near the center of the claim is a shallow tunnel running a little ways up the bottom of the ravine, which develops water, and from the tunnel there was a pipe-line which led on down the gulch to join the line from the lieu tract which fed into the reservoir near the Pools. There was no [103] mill on this tract, and no evidence of occupancy for mining purposes or milling purposes. The work I noted consisted in the excavation of a tunnel, or rather a covered open cut in the bottom of the gulch, and the excavation of a cut along the side which would serve to divert the flood waters past the tunnel.

The next claim examination made was Sunset lode No. 2118-A. I made the inspection of this lode starting from a corner described 4—2118-A. This was on October 18, 1910.

I found this claim to lie is a sandstone formation and to cover a hilly country with some rather deep draws or gulleys. The sandstone formation is that which is so generally exposed at the east and north edges of House Rock Valley. On this claim the rocks were tilted to some extent. I visited the tunnel which was driven into the hillside in a general direction of north about twenty degrees east, and found that only the first six sets of timbers were standing. The rest knocked down and the tunnel was in a very badly caved condition. I went back to the face of the tunnel and made a very thorough

(Deposition of W. L. Walker.)

examination and found that the material was sandstone. There was a trickle of water springing out from the face of the tunnel. There was absolutely no sign of mineral in rock in place or in the float. There was some water trickling out from the mouth of the tunnel down over the dump. There was a pipe-line leading from the tunnel down the hill and down the gulch. The land office plot of the official survey was posted just inside the tunnel.

There was no indications whatever of mining being done or having been done at this time on the Sunset lode.

Comparing the formation on which this Sunset lode was located, and especially that in which the tunnel was driven on the Sunset lode, with the formation in which the Sunset mill site was located and in which the Sunset tunnel was driven, the formation is identically the same; all a part of the series of sandstones and minor amounts of shale, known in common terms as part of the Vermillion cliffs formation; the formation which makes up the Vermillion cliffs being very common throughout the [104] plateau region of the United States and traceable for a great distance along the outcrop with generally constant characteristics although there are local gradations. These claims the Sunset lode and mill site and the Noonday lode, and the Emmett lode which I will mention a little later, and the lieu selection tracts on the east side of House Rock Valley, are all in this same generally similar country and formation. There is no material difference between

(Deposition of W. L. Walker.)

the conditions on the various tracts, except such as involved in topography. One claim may be a little rougher than another and on one claim a little more rock may be exposed to view, while on another claim soil is apparent. There is no essential difference in these claims in this House Rock Country.

The next examination is that of the Emmett lode, made also in October, 1910. This claim was to the southeast from the Sunset lode. On this claim I found a tunnel which had been driven along the surface of a rather pronounced small flat. This tunnel had not gained more than a depth of probably twelve feet, although its length was in the neighborhood of one hundred twenty-five feet. I mention this because of the fact if driven for mining purposes it would be a very foolish procedure since no depth would be gained. This tunnel was caved at the time of the visit and it was simply no more than an open cut of the full length of the tunnel so clearly indicated by the caving at the surface. There was no evidence of the presence of any mineral in or rock in place on this claim; no evidence of any mining operations at that time or having been done prior to that time there. The formation was essentially that I have heretofore described as being sandstone, and no particular difference could be noted between this claim and the other mining claims, mill site and lieu selections that I have described before. [105]

There was some water on this claim. I could hear some water dripping in the tunnel, and saw pipe and

(Deposition of W. L. Walker.)

pipe trenches and the remains of an old water trough to which the pipe-line led. There were two or three there—three other small excavations, which had been made in this same flat I have mentioned, but they were all of somewhat smaller dimensions.

Q. Was their purpose, if any, apparent?

Counsel for Grand Canyon Cattle Company objected that the question calls for a conclusion of the witness, which objection was overruled, and said defendant excepted.

A. The development of water was the only thing indicated at all by any of this work. There was no mineral-bearing rock on this claim nor any of the other claims. It was all similar.

The testimony I have already given in this case covers fully the examination that I have made of all claims belonging to or claimed by B. F. Saunders on the occasion of the examination made by me in October, 1908 and October, 1910.

The surface of the Kaibab plateau is occupied by a formation known as the Kaibab limestone. The quartzite which I have mentioned on the several claims is a silicious phase of this limestone formation. Underlying the Kaibab limestone and extending very nearly to the level of the Colorado River, a few thousand feet lower, is a series of sedimentary beds, chiefly sandstone, limestone and shale. The stratigraphic position of this Kaibab limestone is that just below the red beds of the plateau region. These red beds have been found to contain traces of mineral, but in this section of the country have al-

(Deposition of W. L. Walker.)

most generally proven to be so slightly impregnated with mineral as to be of no economic importance. Some copper ore has been found in the Kaibab limestone on Kaibab plateau, but the conditions under which it occurs are such that its presence is to be determined by its exposure at the surface rather than by the following up of the formation from point to point; that is, wherever the mineral is present on this Kaibab limestone, its presence is readily ascertained by inspection or shallow prospecting. Aside from this, and the presence of some mineral several thousand feet lower in the geological column, the district is without evidence of mineral deposits.

[106]

I did not find any evidence of mineral on any of the claims, that were held under mineral application, in rock in place.

Referring to the Jacobs lode I observed a little copper stain on a very little loose rock on the dump at this cut.

I have testified that I made an examination of the rock in place in that cut and found no copper-stained rock there.

Q. How do you account for the presence of this copper stained rock that you saw near the cut?

Mr. TULLER.—Objected to as calling for the conclusion of the witness, and not an expert opinion.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

A. After a very careful examination of the rock in place, in the cut, and knowing the presence of

(Deposition of W. L. Walker.)

copper-bearing rock at a point a half mile or more to the west of Jacobs lake, the conclusion that arose in my mind was that very probably this copper-stained float which I noticed at the cut had been by some means or other probably dropped at this point, having had its origin in known mineral exposures that I have mentioned a half mile west of the Jacobs lode. This was also based on the fact that on the road running through Jacobs lode at another point I observed a small piece of similar copper-stained rock—a piece of float right on the surface of the road, which gave indications of having been dropped there either by man or from a wagon or some other method of conveyance, from its original site in a mineral deposit a half mile or more west of the Jacobs lode.

Mr. TULLER.—I move to strike out that answer as irrelevant, immaterial and a matter not of expert opinion.

Motion sustained, and counsel for the Government then and there excepted. [107]

WITNESS.—(Continuing:) It is possible that the copper-stained rock did come out of the cut on the Jacobs lode, but if so there was no possible evidence at the time of my examination of such fact, and the probability to my mind is that it did not come from that cut. However, even though it did, it would not affect the conclusions as to the mineral character of the land. Because of the fact that it is frequently the case that traces of mineral are found in the land that has no value whatever of

(Deposition of W. L. Walker.)

mineral purposes and that such traces are present under such conditions which do not warrant the expectation of developing valuable deposits by further work.

I said that even if this copper-stained rock that was found on the Jacobs lode had been found in place that there was not such an amount of copper in the rock that you saw there as would warrant an ordinary mining man in proceeding further to develop it, or to expend money in its development. In other words, even though this copper-bearing rock which I saw had been in place, it didn't constitute a condition which would justify the expectation of the development of a valuable mine, even though further work was done.

The Jacobs lode was the only place amongst all this examination by me, concerning which I have testified, where I saw this detached copper-stained rock. The formations found at the Jacobs lode were not such as are usually found where valuable copper deposits are found.

This occurrence of copper is an unusual one, being wholly unassociated with igneous rock, which is the more frequent association of copper ores. The copper of this vicinity is associated with sedimentary beds; its extent is along the bedding planes; there is no evidence of it carrying to depth, and its presence is not attributed to lateral infiltration. In other words, the conditions with reference to the formations found on the Jacobs lode are not those that are common to copper-bearing communities.

(Deposition of W. L. Walker.)

As to whether or not the identical horizon of the ore-bearing rock in the country to the west of Jacobs lake extends into Jacobs lode [108] itself, I cannot say in the absence of detailed instrumental measurements. It is possible that the said horizon does so occur, but if so it would be at the surface on the Jacobs lode, and if it were mineral-bearing that fact would undoubtedly be patent to casual observation, or would be very readily developed by a very limited amount of work. In other words, if that formation was on Jacobs lode and was mineral-bearing, there would be no difficulty at all in recognizing the fact. And I did not find it apparent in the course of my examination. I have spoken of quartzite having been found on some of these mineral claims which I examined.

Quartzite is not a valuable mineral in the ordinary sense. Quartzite is a hard, very silicious rock, and essentially an altered sandstone. It is sometimes spoken of in common terms as chert, and in general it is of no economic importance; although in some instances some economic use is made of it, it does not rank as an economic product. Under the conditions which it occurs on the Kaibab plateau it is by no means of economic value.

In the course of my examination I visited what is known as the discovery point on these different mineral claims that I examined. In no instance did I find mineral disclosed or exposes on any of the mineral claims, so-called, on any of the claims I examined.

(Deposition of W. L. Walker.)

From my examination of all of these mineral claims there was nothing disclosed to show that any mining ever had been done there, or that there was anything to warrant mining being done. There has been none aside from that I have mentioned regarding the excavation of tunnels and open cuts, but which I did not refer to as mining work. It is mining in the sense that it is an excavation in the ground, but in that sense only.

In the course of my examinations I took photographs of some of the places I visited. Some of the photographs that I took and some that were taken in my presence, are here. I have here before me eight photographs that I have selected as those taken by me on the occasion of my examination of these claims. [109]

The first one is one that I took in 1908 of Jacob lode country taken from a point near the south line of Jacob lode and looking northerly. It shows at the extreme left the Saunders cabin, and in the center Jacob lake with the corral standing just beyond the sawmill. At the right of the lake is shown a portion of the sawdust pile which I have before mentioned. To the right of this are cabins and stables which I have also mentioned before. In the distance is shown the wooded character of the Kaibab plateau. Just at the left of the sawmill is shown the blacksmith-shop.

This photograph was taken in October, 1908. The writing, both on the front and on the back of this photograph is my writing. The writing on the front

(Deposition of W. L. Walker.)

of the photograph is: "1351—M. E. 626, Phoenix series, Jacobs lode," and at the right-hand corner of the photograph on its face the word "over." On the back appears the following: "Looking northerly from point just south of south end line of Jacobs lode showing lake and buildings on the claim."

Mr. SHERIDAN.—We now offer this photograph in evidence. Photograph received in evidence, and marked "Government's Exhibit No. 15."

WITNESS. — (Continuing:) That photograph was taken in October when there was snow on the ground.

The next one was taken by me in October, 1908, standing at the southeast corner of the claim, otherwise known as corner No. 4, looking northwesterly across the claim. The Jacobs lode, showing in the foreground at the left the sawdust pile and several stacks of sawed lumber. In the central portion showing Jacobs lake, the surrounding corral and the smaller connecting corrals on the north side. At the left side of the picture over the sawdust pile is shown Saunders' cabin. In the distance is shown the wooded character of the Buckskin Mountain or Kaibab plateau. [110]

The face of the photograph bears in pen and ink writing the following: "A 1451 M. E. 626—Phoenix series, Jacobs lode," and in the right-hand lower corner the word "over." On the back appears the following: "From corner No. 4 looking north thirty-five degrees west, showing Jacobs lake, corrals, sawdust pile in the foreground; Saunders' cabin in the

(Deposition of W. L. Walker.)

background at the left of sawdust pile. Buckskin Mountains, Arizona, October, 1908."

Mr. SHERIDAN.—We offer this photograph in evidence.

Photograph received in evidence, and marked "Government's Exhibit No. 16."

WITNESS. — (Continuing:) The next one is a photograph taken by myself in October, 1908, standing just to the south of one of the shafts which was returned by the deputy surveyor as an improvement on the Jacobs lode. This picture shows Jacobs lake with the shaft in the center foreground; portions of the corral fences by the lake; Mr. Jensen standing at the left of the shaft; and in the distance the wooded rim of the depressions wherein Jacobs lake is situated. At the right-hand side of the picture and just left of the gate-post and standing out in the central portion of the lake, are shown posts horizontally capped, such as is generally used in the headframe for an old-fashioned well. This marks the site of the second shaft which was returned by the surveyor as an improvement for this lode.

This shaft in the immediate foreground to the center of this picture is one of those which was formerly described by me in my testimony.

It is not the one that was walled up with rock, and which I believe I testified had the appearance of a well, near the lake.

Q. Then please give us a little more information, if you can, as to what was the apparent true purpose of this excavation?

(Deposition of W. L. Walker.)

Mr. STEVENS.—We object to that on the ground it calls for a conclusion of the witness on a matter which does not call for expert testimony. [111]

Objection sustained, and counsel for the Government then and there excepted.

(A. This shaft stands in the basin portion of the lode very close to the edge of the lake. The only useful purpose that it appeared to have served was the possible one of use for well purposes. That is, standing close to the edge of the lake, the lake waters percolating into this excavation, might serve as better water for culinary purposes than the water of the lake which was used for the stock. However, so far as appearances showed the excavation might have been dug simply as an attempt to perform assessment work on the mining claim.)

WITNESS.—(Continuing:) There was no evidence of this excavation having entered rock. The material on the dump was of fragmental character, largely soil.

On the face of this photograph appears in pen and ink writing the following: "A 1451—M. E. 626—Phoenix series—Jacobs lode." In the lower right-hand corner the word "over" appears and on the back the following: "Caved shaft just north of saw-mill and outside of fences of lake. The other shaft is located at right of picture and covered by water."

Mr. SHERIDAN.—We offer this photograph in evidence.

Photograph received in evidence, marked "Government's Exhibit No. 17."

(Deposition of W. L. Walker.)

WITNESS.—(Continuing:) The next photograph is also one taken by myself in 1910. It shows in the center the lake at Mile-and-a-half which is included within the Alaska lode. Surrounding the lake is also shown the five-sided corral which I have before mentioned. At the left of the corral a little in front of the lake is shown a monument on the claim. Just over the right corner of the corral are shown the shallow pits or shafts which I have heretofore described. Just over the center of the lake is shown a cabin. In the background is shown the wooded character of the rim of the depression wherein this lake is situated. This displays the general wooded character of the surface. [112]

Mr. SHERIDAN.—We will now offer this photograph in evidence.

Photograph received in evidence, and marked "Government's Exhibit No. 18."

WITNESS.—(Continuing:) The next is a panoramic view taken in two separate pictures taken from near one of the corners of the Sunset mill site looking across the mill site and showing in the distance the red sandstone cliffs, which I have before described as bounding the eastern and northern edge of House Rock Valley. Two corners of the Sunset mill site are shown on these photos by Mr. Wheeler and Mr. Hoyt, whose positions are indicated by arrows in ink. In the central portion of the left-hand panel is shown the vicinity of the Jacobs Pools tract. Just beyond this is shown a portion of the flat or level portion of House Rock valley which extends off

(Deposition of W. L. Walker.)

to the left. The right-hand panel displays also in the background the cliffs of red sandstone. The principal points shown by the two pictures are the characteristics of the Sunset lode.

I said that in the left-hand panel is shown the vicinity of Jacobs Pools tract. I am unable to identify the exact position of this tract, but it is in that portion of the picture included within the dotted line. I have marked in ink on the right-hand panel the line of adjustment.

Mr. SHERIDAN.—I now offer these two photographs in evidence.

Photographs received in evidence, and marked "Government's Exhibit No. 19-A, and 19-B."

WITNESS.—(Continuing:) The next photograph that I took in October, 1910, the major portion of the lower half of this picture embraces a portion of the surface of the Sunset lode. In the background is shown the sandstone cliffs which I have before mentioned as lying at the northeastern edge of House Rock Valley. At the left of the center of the picture is shown a branch of the gulch on which is located the tunnel which I have before described.

Mr. SHERIDAN.—We now offer this photograph in evidence.

Photograph received in evidence, and marked "Government's Exhibit No. 20." [113]

WITNESS.—(Continuing:) The next is a picture I took in October, 1910, of the long tunnel or open cut I described on the Emmett lode. In the background is the lower portion of a steep, rocky

(Deposition of W. L. Walker.)

hillside, and to the right of the center standing on the surface of the flat I mentioned in my testimony, is Mr. Wheeler above the end of this tunneled open cut excavation. Vertically below Mr. Wheeler at a depth equal to twice his height is the floor of the open cut which is essentially the top of the timbers of the tunnel, which illustrates the fact that I mentioned in my testimony that only about twelve feet of depth was gained by the length of this tunnel. On either side of the cut is shown the soil and debris which has been thrown from the excavation.

Mr. SHERIDAN.—We offer this photograph in evidence.

Photograph received in evidence, and marked "Government's Exhibit No. 21."

WITNESS.—(Continuing:) All these I have described were photographs taken by me. I cannot say without checking up whether these are all that I took. But these were all that were taken by me that I now have in my possession.

(The witness then testified that he was familiar with the cost of tunneling such as was done on the claims he examined, and from his experience he was able to state and did state that the value of the work would not exceed \$2.50 per foot per lineal foot of tunnel work. The open cut rate being at a proportionally lower rate.)

(This testimony was excluded by the Court under the objection previously made as to evidence concerning the cost or the value of improvements.)

And to the ruling of the Court in refusing to ad-

(Deposition of W. L. Walker.)

mit this testimony, the Government, by its counsel, then and there excepted.

WITNESS.—(Continuing:) In the course of these investigations of the claim which I examined, which were held by Mr. Saunders, and concerning [114] which I have already testified, I took samples of the rock found on some of these claims and had some assays made.

Q. Have you with you any records from which you could give us the results of your assays? Now, I direct my question to rock in place on the claims under consideration.

Mr. TULLER.—Object to that as hearsay.

Objection sustained and counsel for the Government then and there excepted.

(A. Yes; I have an assay certificate showing the results of three samples taken from the Jacobs lode.)

Mr. SHERIDAN.—I now offer in evidence as Government's Exhibit No. 22, assay certificate of the Young Assay Office of Salt Lake City, Utah, bearing date December 9th, 1908, and signed by J. V. Sadler, showing the results of the assay of some rock found on the Jacobs lode.

Objected to as incompetent, irrelevant and immaterial, and hearsay.

Objection sustained, and the Government by its counsel then and there excepted.

WITNESS.—(Continuing:) The name W. L. Walker, appearing on this exhibit under the heading, "shipper," is myself. I presented these samples to the Young Assay Office for assaying, and this

(Deposition of W. L. Walker.)

is the certificate returned by the Young Assay Office, the result of that assay. There were three samples. I broke the rock off myself. On this exhibit, under the caption, "Copper per cent wet" there appears in each instance the word returned "trace." That means that whatever copper was present in these three samples was of such small amount the amount could not be determined in figures. That is, it was such a small fraction of one per cent to be practically negligible. It does not amount to anything.

All of the testimony hereinbefore set forth beginning as follows: "I presented these samples," was objected to on the same ground as the objection to the assay certificates.

Objection sustained, and counsel for the Government then and there excepted. [115]

On cross-examination by counsel for the Grand Canyon Cattle Company, the witness testified as follows:

I had no acquaintance with the territory about which I have been talking in my direct examination, except as I acquired it during my visits in 1908 and 1910.

Kaibab plateau is an elevated portion of the earth's crust situated in the north side of the Colorado River on the east side of *Knanb* creek and in northern Arizona, not far south of the Utah line. Its north-western edge is marked by a fault scarp; its southern side is marked by the Grand Canyon. Geologically, it is composed of sedimentary beds; in general horizontally bedded, though on the eastern side there is a monoclinical fold which depresses the rocks of the sur-

(Deposition of W. L. Walker.)

face towards the east. The surface of the Kaibab plateau consists of rolling hills and intervening shallow gulches whose characteristics are very similar from point to point. The plateau is rather generally covered with a stand of timber and with a growth of grasses suited to be used for stock raising purposes. The Kaibab plateau is also known as Buckskin Mountains. In general, it is rather poorly watered so far as running springs are concerned, although there are a few such springs. The plateau is reached by wagon-road leading south from a Utah settlement or by trails from the Grand Canyon. The surface of the plateau is something like 4,000 feet higher in elevation than the Colorado River.

Kaibab plateau is synonymous with Buckskin Mountain range. The two names are applied to this elevated table-land. Officially, and according to the maps of the geological survey it is Kaibab plateau.

The western boundary of this plateau is Kanab creek. On the survey maps I presume the boundary in reality would be a little east of Kanab creek, since a portion of the same elevated surface has also been named Powell's plateau. That is, Powell's plateau is really geographically a part of the Kaibab.

There has been at one time or another considerable mining activity on the Buckskin Mountain range at the point I mentioned west of Jacobs lake, one-half mile or a mile or more, considerable prospect work has been done in the mining line. [116]

The consideration which may govern an ordinary miner in determining upon the development of a

(Deposition of W. L. Walker.)

property cannot be stated by a hard and fast rule. He will reach his determination by, partly at least, considerations peculiar to his individual case; as, for example, his mining experience, personal enthusiasm, etc. All sorts of considerations may enter into his thoughts before or at the time of making any locations. In other words, in the case of a miner making mining locations a variety of considerations may enter into his mind, as in the case of anybody in any other walk of life making any decision.

Water is one of the natural elements that sometimes bothers in the furtherance of mining operations. I would hardly say it frequently intrudes and interrupts for the time being. It is an infrequent instance where there is a great intrud of water encountered in mining excavations that drives the men from these excavations; but I think it is infrequently rather than frequently that such is the case; it does occur.

On redirect examination by counsel for the Government, the witness testified as follows:

As I have stated in my direct examination, there was no evidence at the time of my inspection of any true mining work being carried on, or of any true mining work having been carried on, on any of these specific claims. I also testified regarding the excavation of certain cuts and tunnels on the ground which I stated are sometimes referred to as mining work merely from the fact that they are excavations in the earth. At no one of these cuts or tunnels, at the time of my inspection, were the waters which had been

(Deposition of W. L. Walker.)

developed present in such quantities as to afford any insurmountable obstacle to the carrying on of further excavation or mining development work, had such excavations been started for such purpose.

When I say these specific claims I mean all the mineral claims I examined as shown by my direct testimony, and which were claimed by Mr. Saunders. [117]

I refer to the claims which I testified about in my direct examination. I did not refer to the Petosky or Coconino mining property. Nor to anything I saw in that mining district.

When I examined the Saunders mineral locations or mining claims, I examined them for mineral in general, just as is commonly my practice in the examination of prospects or mining claims, or other claims, with reference to the presence of mineral. I did not limit my inspection or queries to any one, but had in mind minerals in general. I found no evidence of any minerals in any of these mining locations by Mr. Saunders other than a trace that I testified about and which is set out in a Government exhibit—namely, the Jacobs lode. That is all, referring to minerals of economic importance. I say economic importance, as I tried to show in my direct examination, from the standpoint of geology and mineralogy, the earth's crust is made up of a great number of substances which are termed mineral. For instance, the quartzite and sandstone, to which I refer, are composed largely of silica, which, mineralogically, is a mineral; also, this rock contains some iron, some oxygen, and

(Deposition of W. L. Walker.)

some calcium, and among other substances which, in that narrow, restricted sense are minerals, but they are not minerals from an economic standpoint or the standpoint of the miner. They are not such substances, as they exist in the locations referred to, as are recoverable at a profit or useful or marketable materials.

Q. Were the slight evidences of mineralization concerning which you have testified in your direct and re-direct examination such on the Saunders location as to warrant an ordinarily well-informed miner in Utah in expending his money in the development of these claims?

Counsel for Grand Canyon Cattle Company objected on the ground that the question calls for the conclusion of the witness and is not a matter of expert witness' opinion. It means something entirely different from a geologist or mineralogical expert such as this man is. It refers to a miner.

The objection was overruled, and said defendant excepted.

A. No, sir; they were not. I do not know whether I mentioned the Warm Springs mining district or not, but that is the district in the vicinity of some of these claims. I found some evidence of mining operations having been carried on at one time approximately a half a mile away from the Jacobs lode. That was in the vicinity of what has been referred to in this case as the Petosky and Coconino mining property. I didn't observe any mining [118] operations being conducted at the Petosky or Coconino

(Deposition of W. L. Walker.)

properties on the occasion of my visit to that part of the country, and I was up at these properties on both occasions. Considerable excavation work had been made in the surface beds on the top of the Kaibab plateau in those properties; principally open cut work, comparatively shallow, from which had been removed and associated copper minerals. I have no direct knowledge of any ores ever having been shipped out of the Coconino or Petosky properties although I understood that materials taken from those properties were taken as far as the mill or smelter, as what is known as the town of Ryan, which is just at the base of the plateau, but I don't know of any ores having been shipped from the district. The mill or smelter at the town of Ryan was more distant from the mineral locations held or claimed by Mr. Saunders than the Petosky and Coconino mining claims. The Petosky and Coconino claims lie between this smelter and the Jacobs lode. I do not know whether the mill or smelter handled ore from any of the other properties than the Petosky and Coconino properties. I have seen this mill or smelter. It was not working at the time I saw it.

The detached copper stains that I observed at the Jacobs lode was similar to that that I observed at the Petosky and Coconino properties. The gangue was of similar material and the staining was the same copper mineral—that is, of carbonate of copper. When I refer to certain copper stained rock having been observed by me near the Jacobs lake, that rock was the same as the copper stained rock that I saw

(Deposition of W. L. Walker.)

on the Petosky and Coconino properties. I didn't see this material scattered along the road; I just saw in this particular instance that I mention a single piece or two. But its character was the same as that on the Petosky. I saw no such rock as I saw on the Petosky and Coconino properties beyond one or two pieces I saw at the Jacobs lode or any of the other mineral claims held by Mr. Saunders.

(Two photographs shown witness.) Both of those were taken by me, one in 1908 and one in 1910. The one taken in 1908 is a picture [119] I took showing the Saunders cabin and stables on the Jacobs lode claim. In the right center of the picture is shown the cabin; in the left center is shown the stables. Between the two I have dotted a line showing the approximate position of the side line of the claim. The person standing in the foreground of this photograph in the right-hand lower corner is Mr. Joseph Jensen, who has testified in this case.

This photograph on its face contains the following in pen and ink writing: "A 1451 M. E. 626, Phoenix Series, Jacobs Lode," and in the lower left-hand corner the word, "Over," and on the back in pen and ink writing the following: "Saunders cabin and barn. West side line of Jacobs lode indicated by dotted line."

Mr. SHERIDAN.—We offer this photograph in evidence.

Photograph received in evidence and marked "Government's Exhibit No. 25."

(Deposition of W. L. Walker.)

WITNESS.—(Continuing:) The second one is a print of a photograph which I took in October, 1910, at Franks Lode looking in a northeasterly direction and showing in the foreground at the right of the cabin I mentioned in my testimony, and in the left center showing a portion of Frank's lake. This picture also shows the corral fence which surrounds the lake, and just beyond the lake, between the lake and the fence, is shown a rock monument. In the distance is shown a portion of the rim of this basin wherein this lake or pond is situated.

This photograph is mounted on a cardboard on the face of which appears the following legend in print: "U. S. Department of Agriculture, Forest Service." There is on the back of this photograph a printed form which is in blank.

Mr. SHERIDAN.—We now offer this photograph in evidence.

Photograph received in evidence and marked "Government's Exhibit No. 26."

WITNESS.—(Continuing:) The Warm Springs Mining District is in the vicinity of these Saunders claims concerning which I have testified. I don't know the limits of the Warm Springs mining district, or whether the Saunders claims are in them. That is just a miner's term following the requirements of the land laws with reference to the surveys of mineral claims, so I presume these claims [120] might be spoken of as being in the Warm Springs mining district. I am pretty familiar with mining districts in Utah from my experience there both in geological survey

(Deposition of W. L. Walker.)

and general land office. The Warm Springs mining district has never ranked as a producer. The developments at the Petosky and Coconino claims are known to mining men in that State, but it's never referred to as district of importance at all.

Deposition of Joseph Jensen, for the Government.

Counsel for the Government next offered and read in evidence the deposition of JOSEPH JENSEN, who testified as follows:

My name is Joseph Jensen, and I live in San Francisco; my office address is 512 Custom-house. I am mineral inspector of the General Land Office, appointed in 1908, and have served in that capacity continuously except for a leave of absence covering from June, 1910, to May, 1913. I was in active service as mineral inspector of the General Land Office from the time of my appointment in 1908 until June, 1910, and since May, 1913. The technical title I hold is surveyor for the inspection of mineral deposits. Our duties are to see that mineral claimants under the United States laws have complied with those features of the law relative to mineral character. We make field examinations to determine such features. The examinations are not confined to the mineral character of the land. We examine everything that would have any bearing on mineral claims and likewise as to State selections; everything connected therewith. During the years 1908 and 1909 and until June, 1910, I carried on my work as mineral inspector in the States of Utah, Wyoming, Arizona and Idaho. With the exception of Wyoming, where there are

(Deposition of Joseph Jensen.)

other issues involved my work was determining the validity and compliance of the law of mineral claimants, and whether the lands were mineral in character. In connection with Mr. W. L. Walker I made fully examination of the Jacobs lode, claimed by B. F. Saunders, in what is known as the Buckskin Mountain or Kaibab country. That was by the direction of my official superior. I am the Mr. Jensen to whom Mr. Walker referred in his testimony as accompanying him on that occasion. That was in 1908; I was not [121] with him in 1910. On the occasion of my investigation in company with Mr. Walker of the Jacobs lode in 1908 I made notes of the examination.

The Jacobs lode covers a portion of the Kaibab plateau, or the Buckskin Mountains as it is locally known in southern Utah and northern Arizona. Most of the trees that once grew upon the claim have been felled, but there are a few trees standing. The claim lies in a north south direction and has been so located as to cover a depression in the plateau. At the time of our visit there had been a snow storm, but before we left the claim all the snow had evaporated or melted on the ground, so that some of the pictures indicate that there was a covering of snow; but the fact is we were able to see all parts of the claim when the snow had disappeared. In going over the claim we found the various corners going to them in the order of 4, 3, 2, and 1—the various corners of the claim, and thus identifying it and also retracing the lines. In the center of the basin only an alluvial deposit is to be found, but around the rim

(Deposition of Joseph Jensen.)

and at higher portions on the claim outcrops of quartzite are found. We inspected all natural outcrops of quartzite on the claim, looking particularly for evidences of copper staining or other mineral values, but in no case did we find any natural exposures of copper-bearing or other mineral-bearing rock on the claim. We made a careful inspection of improvement number one, which was returned by the deputy mineral surveyor as a trench or open cut in earth and rock. A good portion of this trench is in surface soil, but rock in place is exposed. Though we inspected the open cut very thoroughly, we failed to find even so much as a copper staining in any of the rock. We attempted to inspect Shaft Number 2, but owing to the fact that this is located in a pool of water we were unable to do anything more than run a line to the edge of the pool. We say a portion of the edge of the dump of this shaft, but the earth on the same was of a loose residual nature with scattering of small stones. This was the last material which came from the bottom of the shaft. We retraced the line to Shaft No. 3, and at the point described by the deputy mineral surveyor failed to find the same, but continuing on we found an improvement which would correspond to the improvement which was given by the deputy mineral surveyor. This was [122] the shaft which has been cribbed with slabs. The dump showed more earth than anything else, but there were a few small earth-stained rock fragments on the dump.

A sort of brown rock. When rock has been lying in the earth it has a different appearance than rock

(Deposition of Joseph Jensen.)

that has been excavated by blasting operations. We also inspected the cut made on the sawmill. Beneath the sawmill a pit had been made in which rock in place was exposed. We brushed the surface of the rock off very carefully, but failed to find any evidence of mineralization whatsoever, although we were particularly careful to look for copper staining since the claim lies on the edge of a copper mining district known as the Warm Springs mining district. There were a few pieces of copper-stained float on the claim, but the same kind of float was also noted on the road-way leading to the claim from Warm Springs canyon and House Rock spring. The pieces of copper-stained rock that I noticed on the road was what I call float. Except the distinction that float is simply by definition detached mineral rock irrespective of the manner in which it became detached. You would call this float. Most of the rock that we found was of a different nature than that which has been detached in a different way. In other words, it presented evidences of having been artificially detached from its original formation; it was fragmentary. It was not in place. There was no evidence on the claim of active mining operations nor of sustained operations.

The open cut was in a little knoll near the center of the claim, but so far as having significance as a piece of mining work it merely represented excavation, which, from surface indications appeared to have no mining value beyond that characteristic of annual assessment work. We found the center of the depression occupied by Jacobs lode. The lake was enclosed

(Deposition of Joseph Jensen.)

with a substantial heavy pole fence, making a good corral. In one corner of this large corral there was a smaller corral, and adjoining the large corral there were five pounds and a runway. All of [123] these improvements showed evidence of use of a very substantial nature. Though we saw no cattle in the corrals there was ample evidence that the same had been occupied by stock. On the claim we found a sawmill, blacksmith-shop, and a large pile of sawdust. These three things are just at the edge of the lake, and were so located that the water of the lake could readily be used in the boiler connected with the sawmill. There was also sawed timber located on the claim. Near the south line of the claim there were two barns and three cabins. We stopped two nights in one of these cabins. This cabin had two rooms and a kitchen. Papers found in a writing desk indicated that a family named Brown had been living there, and we confirmed this by talking to Mr. Brown in Kanab later on. The other two of these three cabins are located just off the claim. On the eastern edge of the claim and looking down upon the lake we found a log cabin and identified it as Mr. Saunders' by the official plat returned by the deputy mineral surveyor, John T. Breckon. There was also a dugout on the claim. Despite these many evidences of occupancy there was nothing about any of the improvements or any of the cabins which indicated that they had been used for mining purposes. There was no evidence of occupancy by mining men or miners; there were no mining tools there. There was no evidence on the

(Deposition of Joseph Jensen.)

Jacobs lode of mining ever having been done there other than the cuts that I have described. And these cuts appeared to have no consistent relation to any actual mining operations on the claim.

We also inspected some of the mining development work which had been done in the district something like one-half mile or a mile west of the claim and found the deposit there was blanket formation, by which I mean horizontal formation. The formation exposed on the claim is also horizontal, so that any benefit which might inure to the claim because of its location at the edge of a mining district must be weighed in this connection. This copper deposit is not one which might be developed with depth.

The deposit is one which will lie horizontally and consequently if exposed will extend horizontally from the line of exposure to the limits of the claim, so far as the claimant is concerned. [124] There was no indication found on the claim that this deposit to the west had extended this distance to this claim. Especially in the open cut there was no evidence of vertical fissuring of such a nature that it could be called, with a very liberal interpretation, a lode or being in place. This open cut is at the discovery point of the Jacobs lode.

I observed on the Jacobs lode copper-stained rock not in place, and as I mentioned before, it was different from anything that I observed in place in the open cut.

I could account for some of the rock on the claim

(Deposition of Joseph Jensen.)

because when I visited the mining district I put some rock in my pocket and carried it there myself. On leaving we had too much to take with us and I simply left it there. But after that we saw some rock on the roadway leading to the claim. Some copper-stained rock of the same character, which would be significant as suggesting a conclusion as to how the fragmental rock on the claim got there.

I found no copper-stained rock in place anywhere on that claim. I did find there, other than the pieces that I took there in my pocket from a distant point outside of the claim, some copper-stained rock lying on the claim.

I took one picture of Mr. Walker standing in the open cut. I have that picture with me and I produce it. This photograph bears in pen and ink writing on its face the following: "Jacobs lode—A 1451—M. E. 626, Phoenix Series," and in the lower left-hand corner the word "over." On the back of the photograph appears the following: "Cut No. 1 at north side of Jacobs Lake." Mr. Walker wrote those legends on the back and face of this photograph. That is Mr. Walker standing in the open cut.

I prepared a map as a result of the investigation I made of the Jacobs lode, and I have that map with me. (Witness produces map.) That is the map on which appears the legend "Jacobs lode, Warm Springs mining district, Coconino County, Arizona; survey No. 1923; patent No. 42246; sketch one inch equals 200 feet," and bears the name of Joseph Jen-

(Deposition of Joseph Jensen.)

sen in the lower right-hand corner; also appearing in typewriting in the upper left-hand corner, "W. L. W. M. E. 626, Phoenix A 1451." That [125] map was prepared from field-notes made on the ground and much of the matter given on the map was sketched in my note book on the ground, and then drawn on to this map on my return to field headquarters.

At the time of my appointment as mineral inspector I held the degree of Bachelor of Science of Mining Engineering from the State School of Mines of the University of Utah. I was assistant engineer and geologist at the Bamberger Delamar gold mines of Delamar, Nevada. I have visited and spent some time in most of the mining districts in Utah, and previous to my appointment I spent two years in reporting for the "Salt Lake Tribune," and a portion of that time I was mining editor for that paper. I spent one year in the Royal School of Mines at Freiberg, Saxony. I also spent one year at the Columbia University, and secured the degree of Master of Arts for work done in the department of geology and mining. I visited mineral producing sections in Austria, Germany, Belgium, England, Scotland and Wales, and in New Jersey, Pennsylvania, Utah, Nevada, California and New York. Part of this was prior to my appointment as mineral inspector and part of it during my leave of absence. [126]

Deposition of Edgar L. Clarke, for the Government.

Counsel for the Government next offered and read in evidence the deposition of EDGAR L. CLARKE, who testified as follows:

My name is Edgar L. Clarke, and I reside at Parowan, Utah. I am sixty-five years old and my occupation is livestock and farming. I knew B. F. Saunders, one of the defendants in this case. I would say that the first time I met him was about 1885. I was related to him in business transaction for a considerable time, but not dating back to that particular period. I had some dealings with him in the way of purchasing blooded cattle for him, and I think in January, 1888, he employed me to assist him in buying cattle and sheep for future delivery. I continued to be so employed by Mr. Saunders for considerable of the time for a period of about twenty-three years from 1888. During my employment by Mr. Saunders I was required to visit what is known as the Buckskin Mountain ranch. I received and assisted in the branding of some cattle to put on that ranch. I also assisted in locating some of the claims on that ranch—on the Buckskin Mountain ranch and House Rock Valley for Saunders and Haley, as I understood it. I bought some cattle and arranged for them to be delivered on the Buckskin Mountain ranch, also bought horses from parties that had them running in that section of the country and arranged for their delivery and for shipping them. I assisted the deputy mineral surveyor, Mr. Horn, in the location of some of the

(Deposition of Edgar L. Clarke.)

claims. Some were located as scrip and some as mining claims. I think it was in August, 1900, that I commenced to assist in the location of claims for Saunders and Haley on the Buckskin Mountain ranch. I recall one of the claims which was located by me—the Bessie Horn. As I remember that was located as a mining claim. The Bessie Horn mining claim was along the main road of Jacobs lake and the F. T. Park on the Buckskin Mountain, and as near as I can remember it would be approximately two-thirds of the way from the former to the latter place. I merely assisted in placing the stakes and fixing the corners. It must have been under Mr. Saunders' direction. As a general thing any work that I did [127] on the Buckskin Mountain ranch while claimed by Saunders and Haley was done under the direction or at the instance of Mr. Saunders. With this explanation, that I may have decided things on the Buckskin Mountain and acted on behalf of Mr. Saunders and Mr. Haley, without their knowledge of exactly what I was doing, for they would be in Wyoming and Salt Lake City, and perhaps there might be something come up that I couldn't get their instructions on. I received general instructions from Mr. Saunders, and if any unforeseen details arose that might be attended to *me* me within those instructions, I attended to that myself.

Q. No, directing your attention especially to this Bessie Horn mining claim, what was it that caused Mr. Saunders to have a mining claim made

(Deposition of Edgar L. Clarke.)

on that piece of ground?

Mr. TULLER.—Object to that as calling for the conclusion of the witness, irrelevant, incompetent and immaterial.

Objection sustained, and counsel for the Government then and there excepted.

(A. To secure a watering place for livestock.)

WITNESS.—(Continuing:) I assisted in the location of a number of other claims, but cannot now recall their names.

Q. And was it Mr. Saunders' purpose in locating those claims to secure water for stock-watering purposes?

Mr. TULLER.—Same objection.

Objection sustained, and counsel for the Government then and there excepted.

(A. Yes, sir.)

WITNESS.—(Continuing:) Those claims which I assisted in locating were located for Mr. Saunders.

My employment by Mr. Saunders commenced as nearly as I can recall about 1888 and continued approximately up to the time of his death [128] in 1909. I don't mean to say that I was constantly employed by him, but from time to time from 1888 to the time of his death. I was intimately associated with Mr. Saunders during that time, and knew him well not only in a business way, but as a friend. The partnership relation between Mr. Saunders and Mr. Haley occurred in the fall of 1896, as I remember, and covered the Buckskin Mountain ranch as well as

(Deposition of Edgar L. Clarke.)

other things. I assisted in the survey of those claims on the Buckskin Mountain ranch I think in 1900, and including the time necessary to go from my home and return, as I remember, it would be twenty-four days. My home at that time was in Parowan, Iron County, Utah. It is possible that the time to go from my home to Kanab was not included, and I might have been there instead of home when I received instructions from Mr. Saunders to go to the Buckskin Mountain. I don't know whether I had any written instructions as to assisting in locating these claims. Sometimes he gave me his instructions verbally, and sometimes in writing.

I visited the Buckskin Mountain ranch after the occasion when I assisted in the location of a number of claims a considerable number of times before the sale was made by Saunders and Haley to the Grand Canyon Cattle Company, but I do not recall the dates. I went to inspect the condition of the ranch and the cattle on some of the occasions, and to make purchases, if possible, from any one whom I found claiming watering places or ranches upon this section of the country. That was under Mr. Saunders' instructions to me and I did make some purchases for Mr. Saunders. Mr. Saunders was the dominant factor on the Buckskin Mountain. Mr. Haley lived at Laramie, Wyoming.

I know a man named Charles Dimmick. I first became acquainted with him, probably in 1892. I think at that time he was employed by Mr. Saunders or soon after the time I first met him. This is the

(Deposition of Edgar L. Clarke.)

same Charles Dimmick who was subsequently foreman of the Buckskin Mountain ranch. I do not know what power or authority he has as foreman or superintendent of the ranch. I am not positive as to when he became foreman, but I am under the impression it was in 1901 or 1902. He continued as foreman for a [129] considerable time, possibly he didn't become foreman until 1903. There was another man foreman during the period of time, named Ben Majors. As I remember it Mr. Dimmick continued as foreman from the time of his appointment to the sale to the Grand Canyon Cattle Company.

One of the claims that I purchased under Mr. Saunders' direction from other persons claiming title to certain tracts of land down in the Buckskin Mountain country was later covered by scrip or mining claim. In each instance where *there small* tracts they covered water. I recall purchasing a claim known as the Emmett claim, a watering place held by a party by the name of James S. Emmett. The claim was held by Mr. Emmett at the time I purchased it as a discoverer or locator of the watering place where some improvement work had been done to develop water. I understand it was later located with scrip, but I am not sure as to that. As I remember, I purchased East Pool from him, but I do not remember the form of claim by which it was subsequently held by Mr. Saunders. I don't remember a mineral claim covering a watering place for stock on the Buckskin Mountain ranch known as

(Deposition of Edgar L. Clarke.)

the Emmett lode. I kept no data whatever so far as I remember in regard to these locations, but left it entirely with the surveyor to make his report to Mr. Saunders, and I take it for granted that that is the reason why I am unable to remember the names of these places, etc.

On the occasion of these visits to the Buckskin Mountain ranch I recall that I noticed the piping of water from the watering places on that ranch. I noticed it as early as 1900, but I do not know of my own knowledge who put that piping in there. My observation went to the extent of informing myself that water was carried away for stock-watering purposes, and it was used for that purpose so far as I observed. It was used on the Buckskin Mountain ranch and the House Rock Valley so far as I observed for the watering of livestock only. [130]

The claims that I purchased from other parties for Mr. Saunders were not held by scrip locations as I know. Some of them were held in the form of water claims, and to some degree *of* artificially developed in some instances. My reference to scrip would be after they were purchased from these parties.

I have no correspondence between myself and Mr. Saunders or Saunders and Haley concerning my work done on the Buckskin Mountain ranch. I have made diligent search for such papers. I have shown to counsel for the respective parties certain papers relating to the estate of B. F. Saunders, deceased, which I believe are part of the official records of the court in the matter of the disposition of his estate.

(Deposition of Edgar L. Clarke.)

I was executor of the estate of B. F. Saunders. These are the only papers which I have been able to find after a careful search. I don't know anything of the whereabouts of any yearly reports made by Charles Dimmick to B. F. Saunders at the direction of Mr. Saunders while Mr. Dimmick was foreman on the Buckskin Mountain ranch. So far as I know I have never seen them.

Mr. SHERIDAN.—The balance of the testimony of this witness related to the matter of notice, and we desire to keep that for that occasion. [131]

Deposition of John T. Breckon, for the Government.

Counsel for the Government then offered and read in evidence the deposition of JOHN T. BRECKON, who testified as follows:

My name is John T. Breckon, and I reside at Vancouver, British Columbia. I have been a resident of British Columbia about thirteen years. Before coming to British Columbia I resided at Salt Lake City, Utah, for approximately twenty years. My profession while there was civil and mining engineer, and I am similarly engaged at British Columbia.

While I was engaged in the practice of my profession at Salt Lake City, Utah, I became acquainted with Mr. B. F. Saunders. I first met him just after I went to Salt Lake City in 1898. I met him socially. The first business relations I had with Mr. Saunders was about 1904 or 1905. He got an order for the survey of mining claims in Arizona. I was deputy mineral surveyor for Idaho and Arizona, but I don't remember when I first received that appoint-

(Deposition of John T. Breckon.)

ment, probably two or three years before I was employed by Mr. Saunders to survey some mining claims. It was between 1900 and 1902 that I received my commission as deputy mineral surveyor. Before the work I did for Mr. Saunders I carried on a general mining and engineering surveying practice in Utah and Arizona. My work brought me into the same part of the country that Mr. Saunders had me do work for him. I had surveyed some claims for the Coconino Copper Company, I think, in 1904, which were near the claims of Mr. Saunders. I had other surveying work in that vicinity for the Petosky Mining Company. Close to one of the claims now in suit, the Jacobs lode.

I did no other surveying than the two instances prior to my employment by Mr. Saunders in that vicinity. I had never been in that country before doing the surveying work for these companies.

As near as I can remember, it was in 1904 and 1905 that I commenced work as surveyor in the capacity as deputy mineral surveyor for Mr. Saunders. I have no correspondence with Mr. Saunders. We always [132] met in his office at Salt Lake City and he told me what he wanted done. His office in Salt Lake City was at his residence on North Temple, and he gave me his instructions there. As nearly as I can recollect, the first work Mr. Saunders gave me to do as deputy mineral surveyor was locating some land scrip. I cannot remember where. I located four or five forty-acre pieces. I also located a pipe-line for him. That was before the survey of

(Deposition of John T. Breckon.)

these four mineral claims, the Jacobs lode, the Sunset lode and Sunset mill site, the Noonday lode, and the Emmett lode; that pipe-line was south of the Kane Springs ranch-house. It was built to get the water down the canyon over the rocks and cliffs into the open for the cattle.

Q. Now, I wish you to give your attention first to the Jacobs lode, and in order to aid you in refreshing your memory I will now hand you a document and ask you to state if you recognize it, and if so, what it is. Do you recognize that as a photographic copy of the original papers in the Jacobs lode?

A. Yes, it appears to be a copy.

Mr. SHERIDAN.—We now offer the certified copy of the Jacobs lode in evidence.

Certified copy received in evidence and marked "Government's Exhibit 1."

Q. Mr. Breckon, according to the Government's Exhibit 1, the Jacobs lode was located October 21, 1901. The survey of it was commenced March 12th, 1904, and was completed March 12th, 1904. Now, will you give us, in your own words, as nearly as you can recall, what occurred prior to the survey of this claim between you and Mr. Saunders with reference to the making of this survey? [133]

A. Mr. Saunders called me to his residence in Salt Lake City and said he had some mining claims to survey down in Coconino in House Rock Valley, and he asked me what was necessary to do to get an order for survey. I told him to get his location notices and I had some blanks in the office I would let him

(Deposition of John T. Breckon.)

have, and he could fill them in and send to the Surveyor General in Arizona who would issue the order to make the survey. He did so.

WITNESS.—(Continuing:.) I don't believe he said anything about the mineral character of the claim. He said that Dimmick, the foreman, would show me where the claims were. He told me where I would find Dimmick. I had been there before. I was there before for Mr. Saunders on the scrip locations. None of these scrip locations were placed on the same land covered by the Jacobs lode, nor were they in the vicinity of them. When I say I had been down there before, I mean I had been down to the Saunders ranch in Coconino County, Arizona, in the House Rock Valley on the east side of the Buckskin Mountains.

I made a preliminary survey of the Jacobs lode prior to this formal survey that I made under Mr. Saunders' direction. That was probably a year or so before I went to Saunders. The preliminary survey was made about a year before the survey that is indicated on the Government Exhibit 1, but it was not made for Mr. Saunders. I believe it was made for the Coconino Copper Company. It was just a location survey 800 by 1,500 feet. At the time of this preliminary survey there was a pond of water on the ground covered by this claim, and old sawmill and a small hole for discovery with some copper rock, and a small dump.

The pond of water was about 300 feet in diameter, and covered about an acre or two, as near as I can

(Deposition of John T. Breckon.)

remember. There were no streams running into it or out of it. It just seemed to be a natural depression of a body of water. There were some buildings there, I believe two houses, I don't remember exactly, and there was an old sawmill. There [134] was no one living there. I believe the houses were dwelling houses. The old sawmill was not running at the time, and I didn't pay any *any* attention to its condition. I think it had been used a short time before, but I didn't go in it. I didn't see any people there, and I don't remember seeing any stock about the place, and couldn't say about any fences about the spring or house.

I spoke of a discovery for a preliminary survey which was made for the Coconino Copper Company. There was a small rock monument with a location notice and open cut about four feet wide and four or five feet long and two feet deep that was there at the time I went there, but I don't know who placed it there. The open cut was north of the pool of water a few hundred feet. There was some copper-stained rock there, but I didn't look to see whether or not it came from the rock in place in that cut. I didn't pay any attention to it. I noticed a small heap of copper-stained rock right by the side of the cut I have referred to thrown out to one side of the cut, but I can say nothing as to where that copper-stained rock came from. I didn't notice any copper-stained rock in place in the cut.

When I subsequently made the survey for Mr. Saunders of the Jacobs lode, as shown in Govern-

(Deposition of John T. Breckon.)

ment's Exhibit No. 1, there was a change in conditions there. The cut was longer and there was a corral built at the north end of the spring, just a cattle corral. I don't remember how large the corral was. I don't remember whether there was a fence about the spring at that time. I think the same buildings were there that I observed on the preliminary survey. There were no people there at the time. I don't remember whether there was any stock there.

The extension of that cut was not made by, and I don't know who extended it. I observed the same pile of copper-stained rock there in the same place when I surveyed the Jacobs lode for Mr. Saunders. I measured this cut to see how much work had been done, and estimated the value. I don't remember whether that in the course of measuring it on [135] that occasion of finding any of this copper-stained rock in the cut. I cannot say that I examined it any further than I had before. I saw the copper-stained rock on the dump. I saw the size of the dump and estimated the cost of the work. I made no inspection there on the occasion of the preliminary survey or the occasion of the survey of this Jacobs lode for Mr. Saunders as shown in Government's Exhibit No. 1, with a view to determine whether there was copper rock in place in this opening.

On the occasion of this preliminary survey I had some men with me who were working for the Coconino Copper Company, but I cannot remember their names. The survey I made for the Coconino Copper Company covered the same ground that was covered

(Deposition of John T. Breckon.)

by the Jacobs lode. When I made the survey of the Jacobs lode at Mr. Saunders' direction Mr. Saunders made no reference to the manner in which that survey should be made as to what ground it should cover or otherwise. When I made the patent survey I made it according to the location. I located the patent post. I went according to the location that was already on this land. The preliminary survey covered all of this pool of water, and that survey for Mr. Saunders, as shown in Government's Exhibit also took it all in.

That preliminary survey had nothing to do with the Saunders Jacobs lode. I knew when I went down there where I was to place this survey for Mr. Saunders by Mr. Saunders' location stakes. I saw these stakes at the time of the preliminary survey for the Coconino Copper Company. At the time of my conversation with Mr. Saunders in Salt Lake City he told me that the Jacobs lode was at Jacobs lake, and he wanted me to make the survey at the Jacobs lode, as it had been placed there before by him. On the occasion of that survey I don't remember whether anybody else was with me. I cannot tell whether Charles Dimmick was with me. He was with me part of the time of the survey, whether he was there all the time I don't know.

An employee of Coconino Copper Company showed me the place. I came within one thousand feet of it. [136]

Q. Now, will you give us, in your own way, just

(Deposition of John T. Breckon.)

how it was that you computed the value of the development work done on this claim?

Objected to as incompetent, irrelevant and immaterial, and within the ruling of the Court as to the cost of the work.

Objection sustained, and the counsel for the Government then and there excepted.

(A. The open cut was the one mentioned before at the discovery and was estimated in the usual way. A tunnel in hard rock is estimated from \$10 to \$12 per foot, and an open cut is estimated according to the depth of it.)

WITNESS—(Continuing:) The shaft that was partly covered by water—partly filled with water from the lake was on the west side of the lake was in the lake and covered over with high water when I saw it. On the occasion of this survey there was water in it. I cannot say the depth. I ascertained the dimensions of that shaft only by the timbers that were sticking up above the ground at the top of the shaft. Some square timber with boards to keep the dirt from running in, something like the ordinary uprights above a well. The upright timbers above the boxing consisted of irregular ends of timbers to which boards were nailed.

Referring to the shaft in Government's Exhibit No. 2, "A shaft 4"x6' and 22' deep in earth; well timbered, we measured that shaft with a stick; a man I had with me and myself measured it. We didn't go down in the shaft, it was not more than 22 feet deep. It was not more than half of that.

(Deposition of John T. Breckon.)

Mr. Saunders and Mr. Dimmick gave me the depth of the shaft. We could run a stick down into the shaft. As regards the depth, as stated in these notes, I relied on what Mr. Dimmick and Mr. Saunders said of the depth. As to being well timbered all the way down when I examined it it was timbered on top. There was a firm backing on top of *of* the up-rights where the box was nailed. There were two shafts. The one I have just described is the one that was filled up with water. [137]

I made a return of the other shaft; it is given as No. 3 in Government's Exhibit No. 1, "A shaft 4x6 feet and 16 feet deep in earth, well timbered." I cannot tell you relatively where that shaft No. 3 was located unless I have a plat. I think the shallow one, the one fourteen feet deep was close to the lake. I don't remember whether there was any super-structure on this fourteen-foot shaft. There was some timber, but whether it stuck up above the ground I don't remember. I believe both shafts had water in them at the time I made the survey. In other words, they were both inside of the rim of the pool.

I have been engaged in mining engineering as well as surveying for a period of twenty years. I made the survey down there for the Coconino Company and the Petosky Company, and have made surveys for several big mines in the United States—The Annie Laurie Mining Company, the Mammoth and Grand Central Mining Companies. Those are in Utah, and are well known properties there. I had

(Deposition of John T. Breckon.)

connection with these properties, worked on them prior to the time of making these surveys for Mr. Saunders. I don't, in the performance of such work, take any particular interest in the geology of the country or observe it.

I noticed that the copper rock of the Buckskin Mountain was bedded, sedimentary formation; that it didn't lie in veins or lodes as is usual in mining districts. With reference to this particular claim the Jacobs lode, I didn't notice all the mineral at all. I don't think most of the claim was covered by water in this particular instance, about a couple of acres was at the time I saw it. I noticed the open cut, but I didn't make a detailed inspection. I noticed it for the purpose of measuring it. The rock I saw there was porphyry. I wasn't present when the work on the Jacobs lode was made.

Q. What did you have to guide you as to the expense of making that open cut? [138]

Mr. TULLER.—I object to that under the general ruling.

Objection sustained, and counsel for the Government then and there excepted.

(The witness testified that his return as to the cost per foot was not based upon his personal knowledge as to the cost of making the cut, but on the amount of the work that had been done, and his estimate of the value of it was what Mr. Dimmick or Mr. Saunders may have told him; that he estimated the cost of the two shafts by the kind of dirt that had been taken out; that he estimated the deeper

(Deposition of John T. Breckon.)

shaft by taking the depth that Mr. Dimmick gave him. All of which testimony was excluded under the ruling of the Court.)

(A certain copy of the records of the General Land Office in the Sunset lode and Sunset mill site were shown the witness.)

A. I believe that is the abstract.

Mr. SHERIDAN.—I now offer the certified copy of the records of the General Land Office covering the Sunset lode and Sunset mill site in evidence.

Copy received in evidence and marked “Government’s Exhibit No. 2.”

WITNESS.—(Continuing:) With reference to the Sunset lode and Sunset mill site, Mr. Saunders got the blank applications and sent them to the surveyor-general who issued the orders to me. When I got them I went to Mr. Saunders and told him I had the orders for survey. We arranged to go down there, so I did. He said Mr. Dimmick knew where the corners were and would show me the claims. Mr. Saunders went down with me once. I don’t remember which claims were surveyed at that time. I know once we were down there in February, but I cannot tell you what year. We were making some surveys, but I don’t remember which. He sent me up on top of the mountains to make some locations south of Jacobs lake. As near as I can remember Mr. Saunders was locating this scrip when he was there. That was, I think, in 1904, but I don’t recall the part of the year. My best recollection is that it was in February Mr. Saunders was down there. I cannot remember whether I made a pre-

(Deposition of John T. Breckon.)

liminary survey [139] of the Sunset lode and Sunset mill site—I think I did of the Sunset lode. As near as I can remember I think we located the scrip before I surveyed the Sunset lode and Sunset mill site. I think we had a pipe-line running from Sunset Spring, and I ran that up. I think I located the pipe-line and made a preliminary survey of the Sunset. The location of the scrip and the location of the pipe-line were some time before the survey of the Sunset lode and mill site, but I don't remember how long. On the occasion of the survey of the land covered by the scrip and pipe-line to which I have referred, the scrip was located south of the mining claims and there was a pipe-line from the mining claims to where the scrip was located. The name of the place where the scrip was located was Jacobs Pools Corral.

The map to which I refer, and which was produced by me personally for this hearing, shows a pipe-line running from the Sunset mill site to the Jacobs Pools Springs and then from there to Jacobs Pools Corral, or ranch. That is correct. This map was prepared by me about 1905. After I completed the surveys for Mr. Saunders on my return from Salt Lake this was made on inspection that I made and the description of the pipe-lines.

Mr. SHERIDAN.—We now offer that map in evidence.

Map received in evidence and marked "Government's Exhibit No. 3."

WITNESS.—(Continuing:) I made four trips for Mr. Saunders down there, and this map was

(Deposition of John T. Breckon.)

made from the notes on each of those trips. The earliest trip was some time prior to the survey of the Sunset lode and Sunset mill site, and the last trip I made down there was to survey the Sunset mill site and the Sunset lode. This tracing is based on the information that I acquired on the four trips. I wish to correct that statement—the last trip I made down there was a year or two after that. I went down and surveyed the boundaries of the Grand Canyon Forest Reserve, and that made three trips for Mr. Saunders, and the fourth trip to survey the Forest Reserve, but not for Mr. Saunders. The map is [140] based on data I gathered on three trips for Mr. Saunders. The last one when the Sunset lode and mill site were surveyed.

In the center of Government's Exhibit 3 appears an area marked as Township 38 north, Range 4 east, and within the area appears a square marked "Jacobs Pools Springs," and a smaller area adjoining marked "Sunset mill site." The small line leading from the Jacobs Pools Spring to the Sunset mill site and running down to Jacobs Pool ranch indicates the pipe-line.

There also appears within that same area of the same exhibit a small square marked "Emmett lode," from which there runs a line marked "pipe-line" ending on the point opposite the area described as Township 38 north, Range 4 east, bearing the legend "tank." That is the pipe-line running from the Emmett lode to a tank. I think that was a wooden tank used as a watering trough for stock.

(Deposition of John T. Breckon.)

In the same exhibit No. 3, there is a square with the legend "Jacobs Pool Corral," and a line marked "pipe-line" running between Jacobs Pools Corral and Jacobs Pools ranch. That pipe-line was to carry water down to the Jacobs Pools Corral from the Jacobs Pools ranch. In the upper left-hand corner of the same exhibit there is a small square marked "Noonday lode spring," and another square marked "One Mile Spring" and still lower down a square marked "House Rock Valley," and a line connecting all three and running to the square marked "House Rock Corral." That line indicates a pipe-line to carry water down to House Rock Corral for stock and domestic purposes. In the lower left-hand corner of the same exhibit is a square marked "Kane lode"; also a square marked "Kane mill site" and a square marked "Kane Corral," all connected with a line. That line also connects a pipe-line for the purpose of carrying water for domestic purposes and for stock. [141]

All the pipe-lines that show on this exhibit were surveyed at the time the scrip was located, and I believe all the scrip was located before the surveys were made for the Sunset mill site and the Sunset lode. I cannot say whether the surveys of the pipe-lines and the scrip were all made prior to the making surveys of the four claims in issue in this suit, namely: The Sunset lode and mill site, the Emmett lode, the Noonday lode, and the Jacobs lode. I think the scrip was located at two different times. The pipe-line at the Kane corral was surveyed at the time the scrip was put on there. It was the first scrip

(Deposition of John T. Breckon.)

located. I don't remember now what other pieces were located at that same time. At the time the Jacobs pool corral and the Jacobs pool ranch was located that pipe-line was surveyed, the pipe-line was in at that time. The same at House Rock corral. I believe that pipe-line was surveyed at the same time the scrip was located on House Rock Corral.

This exhibit—Government's Exhibit No. 3, does not show all the pipe-lines that I surveyed for Mr. Saunders. There was one other. (Witness produces a blue-print.) The original of that map was prepared by me, I believe was filed by me with the General Land Office. I made it for filing, and this blue-print was prepared under my supervision. The survey was made on the 12th day of September, 1903, and that is shown both on the surveyor's certificate and in the applicant's certificate, as they appear on this exhibit.

Mr. SHERIDAN.—The Government will now offer in evidence this blue-print produced by the witness and which bears the legend "B. F. Saunders" pipe-line and reservoir on the Grand Canyon Forest Reserve, Coconino County, Arizona."

Blue-print received in evidence and marked "Government's Exhibit No. 4." [142]

WITNESS.—(Continuing:) The small map in the right-hand lower corner of this exhibit, is what is called a key map. That is a map on a smaller scale, so that the location with regard to some prominent object can be shown. The purpose of this

(Deposition of John T. Breckon.)

map was to show the location of the pipe-line to carry water down into the valley to a tank or reservoir for watering stock. The general body of this map shows the route of the pipe-line from the canyon to the tank. This was made for Mr. Saunders after I made the survey. He wanted to use the water for watering stock. The tank indicated in the upper right-hand corner of this exhibit 4 from the nearest of the four patented claims now in suit is about thirty miles to the Sunset lode, nearly south, but it's on the north side of the canyon. I don't know that the land on which this land was located was held under any form of application at the time the form was made. The area marked on this exhibit "Reservoir 150,000 gallons," was for the purpose of catching the overflow from the tank at the end of the pipe-line. The tank I refer to now in speaking of this reservoir is the one at the bottom of the map or reservoir or the sketch marked "reservoir," and is an enlarged scale of that shown at the end of the pipe-line. So that area to which I have just now referred marked "reservoir" and the small adjoining area marked "tank" is merely an enlargement of the tank and reservoir shown at the end of the pipe-line. In the upper right-hand corner of Government's Exhibit No. 4, and the sketches on the left-hand lower corner showing the side and end views of the tank are the details of the details of the tank referred to in my testimony concerning this exhibit. I have a blue-print of the patent survey of the Emmett lode and Noonday lode, the Sunset lode and mill site. I have a plat of the Jacobs Pools

(Deposition of John T. Breckon.)

corral, scrip location, and also a blue-print of Kane Springs scrip location.

Mr. SHERIDAN.—We now offer the blue-print of the Emmett lode just furnished by Mr. Breckon in evidence. This is the same Emmett lode not in issue in this suit, the survey number being 2141.

Blue-print received in evidence and marked Government's Exhibit No. 5. [143]

Mr. SHERIDAN.—We also offer in evidence the blue-print map produced by the witness showing the survey of the Noonday, survey No. 2140, being the same Noonday lode now in issue in this suit.

Blue-print received in evidence and marked Government's Exhibit No. 6.

Mr. SHERIDAN.—We also offer in evidence the blue-print of survey No. 2118, A and B being the Sunset lode and Sunset mill site now in issue in this suit.

Blue-print received in evidence and marked Government's Exhibit No. 7.

Mr. SHERIDAN.—We also offer in evidence the blue-print of the survey of the forty-acre tract known as the Jacobs pool tract.

Blue-print received in evidence and marked Government's Exhibit No. 8.

Mr. SHERIDAN.—We also offer in evidence the blue-print showing the forty-acre tract known as the Kane Springs tract.

Blue-print received in evidence and marked Government's Exhibit No. 9.

WITNESS.—(Continuing:) With reference to the condition of the land embraced within the Sun-

(Deposition of John T. Breckon.)

set lode and mill site when I first visited them, as regards the character of the ground and the improvements, as near as I can remember, the claims laid near the foot of the sandstone bluffs—just a broken country. I believe there is a spring of water on both the lode and mill site. The springs had been developed—that is, cleaned out, and opened up. There is a tunnel on the lode claim 4x6 feet and 90 feet long in sandstone; an open cut on the mill site 6 feet deep and 10 feet wide and 50 feet long in earth and loose rock. I believe I went into the tunnel on the lode. The first part of the tunnel was timbered, it was in sandstone. There was a small stream of water [144] in the tunnel which was running out of the tunnel. I believe it ran out of the tunnel or was conducted into a trough. I cannot now remember by what means it was conducted to this trough, but by a wooden trough or pipe; it was not by a ditch. The trough was a cattle trough. It was right at the mouth of the tunnel I believe. I didn't observe the character of the formation of the tunnel. I referred to it as sandstone bluff, but I cannot tell what color of sandstone it was, because there is a red sandstone and a gray sandstone both there, and I cannot remember whether that work was in red or gray. I don't believe I went back in the tunnel, I sent a man in with a long tape line. I simply measured the size and the length of the tunnel to get the value. I made no report on the mineral character of the land in which the tunnel was placed and didn't observe anything as regards to the mineral.

(Deposition of John T. Breckon.)

I cannot say whether I saw any mineral lying there outside of the tunnel.

Q. Of course I realize, Mr. Breckon, it was a fairly good time ago, and these details may be indistinct now, but from your testimony I gather that you observed that the tunnel, as far as you observed at that time had been used for the development of water. Is that correct?

Objected to as incompetent, irrelevant, immaterial and calling for a conclusion of the witness.

Objection sustained, and counsel for the Government then and there excepted.

A. They were using it, taking water out.

Q. Did you see anything in that vicinity in this tunnel to show that mining had been carried on there as mining business rather than for the development of water?

Defendant objected on the ground that the question called for a conclusion of the witness and was incompetent, irrelevant and immaterial.

Objection overruled and exception taken.

A. No; no mining there. There was no mining there; there were no other improvements than this trough or pipe-line that conducted the water to the trough for cattle at this lode that I observed. The lode was approximaely 2200 feet from the Sunset mill site. The mill site is located nearer the sandstone bluff than the lode claim, and near the Jacobs Pools Spring. The character of the rock at the mill-site [145] was the same as that at the Sunset lode, where exposed. I believe the ground is not so

(Deposition of John T. Breckon.)

broken on the mill site as on the lode, but in other respects the rock formation appeared to be of the same nature. There was an open cut on the mill site as shown in Government's Exhibit No. 2. I believe there was water in the open cut. I don't remember that there were any improvements for the purpose of developing water, just some water in the open cut, a small stream running out of the cut.

I don't think there was any pipe in the tunnel on the Sunset lode, but it began near the mouth of the tunnel. They got the water near the mouth of the tunnel.

The testimony I have been giving about the Sunset lode and Sunset mill site refers to the occasion when I made the patent survey of that. I think I made a preliminary survey of the Sunset lode at a prior time. I cannot recall whether I did of the mill site, but I probably did at the same time. I made the preliminary survey at the Sunset lode at the request of Mr. Saunders. They were already located and staked. I had nothing to do with the locating. Mr. Dimmick was with me when I made this preliminary survey of the lode which I think was in the middle of the summer of 1904. We had two other men with us, but I don't remember who they were. My son was with me at either the patent survey or the preliminary, I don't remember which. The other persons there were employees of Saunders. They were persons as near as I recall under Mr. Dimmick's direction as foreman for Mr. Saunders.

At the time I made the preliminary survey of the

(Deposition of John T. Breckon.)

lode claim, I surveyed a pipe-line from the lode claim to the Jacobs Spring. I think there was a pipe-line also to the Jacobs pool corral. The pipe-line to the Sunset mill site is just a short distance. It wasn't hardly a survey, just a straight line. I think the mill site was at a lower elevation than the lode. I cannot recall whether the pipe-line was surveyed from the mill site at that time as well as the lode, I think I did. I believe it was at that time that a pipe-line was surveyed from the mill site. [146]

Q. Now, give us the manner in which you computed the amounts of money expended in development work on the Sunset lode?

Objected to under the general ruling as to the value of improvements.

Objection sustained, and counsel for the Government then and there excepted.

(The witness then testified that the usual allowance in sandstone rock was from eight to ten dollars per foot for tunneling; that it would cost more down in that country on account of the distance from supplies.)

WITNESS.—(Continuing:) I don't know who it was that performed that tunnel work. I am satisfied it was done under Mr. Dimmick. Ranch riders are not usually miners and they would have to get miners to do the drilling. They might use the ranch hands for handling the dirt, as muckers. I was acquainted with Dimmick at that time, and he was not experienced in matters of that kind at that time. I don't know whether Mr. Dimmick or any of his force

(Deposition of John T. Breckon.)

was qualified to carry on this mining work.

On this Sunset lode at what was designated in Government's Exhibit No. 2, as discovery point—there was simply a stake set in a pile of the rock; that rock was simply country rock piled up. I didn't notice any mineral there. I don't recall whether a person by the name of H. B. Young accompanied me on the occasion of the survey of the patent of the Sunset lode. The matter of the party accompanying me was attended to by Mr. Dimmick. I went to see Mr. Dimmick at the direction of Mr. Saunders. In each instance, with reference to the Jacobs lode, and with reference to the Sunset mill site I received my instructions from Mr. Saunders at Salt Lake City, and I then proceeded to Mr. Saunders' ranch and received my instructions or directions from Mr. Dimmick. He furnished me with men and all I needed by way of transportation and supplies. All the expenses I was put to incident to all these surveys were paid by Mr. Saunders. [147]

There was a stone house on the scrip location at the Jacobs pools ranch, as indicated in Government's Exhibit No. 3. As near as I can remember that was just a stone house probably sixteen by twenty-four feet, with shingle roof used as a camp house I believe. There was no one there when I was there. On the occasion that I was there we stopped there to eat. I don't remember whether we went in the house or not. The house appeared to be used for the men to cook and sleep in. I believe it was on Saunders' property and was used by the men on his

(Deposition of John T. Breckon.)

ranch. I don't remember whether there was anything stored in the cabin. We took a cold lunch with us when we stopped there and I don't remember whether we went into the house or sat outside by the tank. There was tank there near this house, a small tank probably a hundred-foot square, an earth bank or pool. I believe there was a pipe leading into that tank coming from Jacobs Pool Spring and that constituted another watering place for stock.

I don't believe I drew any of the papers for Mr. Saunders on any of these claims. If I did write any location notices or drew any of these location notices, in every case that I did that and signed another party's name I also signed my own name by "J. T. Breckon." If the record shows any with my name on, then I drew them.

(Witness shown certified copy of the records of the General Land Office relating to the Noonday lode.)

WITNESS.—(Continuing:) I believe that is a copy of the abstract.

Mr. SHERIDAN.—We now offer in evidence certified copy of the official record of the General Land Office relating to the Noonday lode.

Certified copy received in evidence and marked Government's Exhibit No. 10.

WITNESS.—(Continuing:) On the occasion of making this survey Mr. Dimmick was with me for one. Government's Exhibit 10 shows that my son Leroy Breckon was there. In each case where he accompanied me to make surveys he went with me from Salt Lake City. [148]

(Deposition of John T. Breckon.)

In the case of the Jacobs lode and in the case of the Sunset mill site and the Sunset lode, I personally made the survey of each one of these claims myself for patent by going on the ground, making examinations and then making my returns.

Q. Now, will you please tell us the manner in which you computed the amount expended for improvement on the Noonday lode?

Objected to on the same ground already made to evidence of value of cost of work.

Objection sustained, and counsel for the Government then and excepted.

(The witness then testified that he made the estimate of the cost of the work by indicating the dimensions of the tunnel, seeing the character of the work and making an estimate of the cost; also from information from Mr. Dimmick as to what the actual cost was, and that such cost included only the development on the ground and did not include pipelines.)

WITNESS.—(Continuing:) I didn't make a preliminary survey of the Noonday lode; I recollect that fact clearly, because the claim is located on the crest of the sandstone bluff. It is impossible of assent, and I could remember that if I had made another survey before the patent survey. When I made this survey for patent of the Noonday lode I observed development work and improvements at that time. There was a tunnel four-by-six and forty-five feet long; also a tunnel four-by-six and twenty-five feet long that was there at the time I made the survey.

(Deposition of John T. Breckon.)

That is all the work done on the claim. I don't know when it was made. I don't know when any of the improvements or development work that I found on the Jacobs lode, Sunset lode and Sunset mill site were made.

I believe there was water in each of the tunnels on the Noonday lode. It was piped to House Rock Corral at the time I made the survey on this claim. I don't remember whether the pipe ran into a trough or a receptacle to store water, but at the House Rock Corral there was [149] drinking troughs for the stock. The formation of the Noonday lode was of the same general character as the Sunset—sandstone. The Sunset lode and mill site was about in an easterly direction from the Jacobs lode. I think about twenty or twenty-five miles. The Noonday lode was about ten miles northwesterly from the Sunset lode, and about ten or twelve miles from the Jacobs lode in an easterly direction. I didn't notice any other improvements or development on the Noonday lode than those I have testified to. There were no buildings or structures there other than the buildings and pipe-line than I have spoken of. I didn't see any mining carried on about the Noonday lode when I was there. These three claims and mill site so far described by me were in the Warm Springs mining district. I don't know when that district was established. I ascertained it was in the Warm Springs mining location by the location notice placed there by Mr. Saunders' people.

(Witness shown certified copy of the records of

(Deposition of John T. Breckon.)

the General Land Office with relation to the Emmett lode.)

The WITNESS.—I believe that is a copy of the abstract.

Mr. SHERIDAN.—We now offer in evidence the certified copy of the official records of the General Land Office relating to the Emmett lode.

Copy received in evidence, marked "Government's Exhibit No. 11."

WITNESS.—(Continuing:) I don't remember whether I made a preliminary survey of the Emmett lode. At the time I made the survey for patent of the Emmett lode there was a tunnel on that lode, I believe about fifty feet. The dimensions were four by six, and it was partly timbered. I went into that tunnel myself and measured it up all the way back. There was water in that tunnel, but I don't remember how it was handled. It ran out of the tunnel, but I don't remember whether there was a pool outside of the tunnel or not, or whether there was a pipeline leading out of the tunnel. It seems to me there was a drinking trough near the mouth of the tunnel at that time; that trough appeared to be in use at the time I was there. The development work I saw on this claim at the time I surveyed it was a tunnel four-by-six feet and fifty feet in length. [150] I know there was not enough work done to get a patent on at that time, and I refused to return it until there was more work done. The tunnel was in sandstone rock, the same formation as on the Sunset lode. I did not go back into the tunnel myself. The for-

(Deposition of John T. Breckon.)

mation was of the same kind of sandstone as on the three claims concerning which I have already testified. I believe it was solid sandstone back to the face. The work in the tunnel appeared to have been just done when I was there. It was in good repair. I would like to make an addition to my statement, and that is at the time I made this survey there was one tunnel that was caved in at the mouth and at this time I cannot place it here or say which of the claims it was on. I believe it was one of the tunnels on the Sunset lode. I don't remember any improvements about the Emmett lode other than the tunnel and drift I have testified to. There were no houses or other structures of any size on the ground there. There was no mineral stored outside of the tunnel or in the tunnel. The Emmett lode is easterly from the Jacobs lode twenty or twenty-five miles and about a quarter of a mile from the Sunset lode and about a half a mile or a mile from the Sunset mill site, and about ten miles southeast from the Noon-day lode. At the time I made the survey of that claim Mr. Dimmick and my son were with me.

I believe there was a pipe-line on the Emmett lode at that time, but I have no recollection of it, aside from refreshing my recollection from Government's Exhibit No. 3. I now remember running a pipe-line out to the tank and seeing that tank there, but at what time I don't know. It must have been the time I made the last trip down there. The pipe-line surveyed from the Emmett lode was made by me during the survey for patent; that day; I know it

(Deposition of John T. Breckon.)

was prior to the patent survey or at the same time.

(The witness then testified as to the cost of the improvements on the Emmett lode as being eight or nine dollars per foot; that subsequently additional work was done as reported by Mr. Saunders to the extent of twenty-five feet, and on his report of the performance of additional work which the witness did not see or examine, he made the return that the requisite amount of work had been done and the report of the additional work was made to him by Mr. Saunders, at Salt Lake City, orally. [151] This testimony was objected to under the objection previously made. Objection was sustained, and counsel for the Government then and there excepted.)

WITNESS.—(Continuing:) I made just one visit to the Sunset mill site when I surveyed it for patent. Some water had been developed on that mill site as I have testified. I didn't see any mineral stored on that mill site or any structures there other than I have testified to. I don't recollect as to whether there was a pipe-line leading from the mill site to some other place. The only way I have of telling that is from the Government's Exhibit No. 3, which shows a pipe-line from the Sunset mill site to the Jacobs Pools Spring. The mill site is of a greater elevation than the Jacobs Pools Spring. I don't remember whether at the time I surveyed the mill site that pipe-line was conducting water from the millsite.

I recall having been interviewed by Mr. W. L. Walker, mineral inspector of the General Land Of-

(Deposition of John T. Breckon.)

fice, on April 11, 1913, and I recall executing an affidavit before Mr. Walker.

(Counsel hands paper to witness.) That is the affidavit I made, I believe. At the time I made this affidavit Mr. Walker disclosed the fact that he was acting as mineral inspector of the General Land Office. Each page of this affidavit bears my signature. Having read the affidavit I recall that the statements made in the affidavit are correct. At the time I made the affidavit I had all my note-books and records before me. At this time I have nothing but the official plats and records. I now desire to state that the affidavit shows more in detail and with a better degree of recollection what the situation was then than I now recall at this time.[152]

Counsel for the Government then offered in evidence the affidavit of John T. Breckon, referred to in the foregoing examination.

Objected to as incompetent, irrelevant and immaterial. Objection sustained, and counsel for the Government then and there excepted.

Affidavit marked "Government's Exhibit No. 12."

WITNESS.—(Continuing:) I surveyed lands in the same part of the country for Mr. Saunders with a view of placing scrip thereon. Governments Exhibit No. 3 shows all of these scrip surveys made by me at Mr. Saunders' request. The one nearest the northeast corner of the map marked "One-mile Spring" and the one adjoining that marked "House Rock" and the one in Township 38 north, Range 4 east, marked "Jacobs Pool Spring" were the only

(Deposition of John T. Breckon.)

scrip locations that had springs on them. The others had water on them, carried by pipes. The water was piped from the springs outside the tracts. The names of these tracts where the water had been piped from the place outside of the tract were the House Rock Corral, Jacobs Pools ranch, Jacobs Pools Corral, Kane Corral. The places where the water was piped to these tracks are indicated as well as the pipe-lines connecting them on Government's Exhibit 3. I don't remember of surveying any scrip location for Mr. Saunders other than those shown on Government's Exhibit No. 3, in the same part of the country where the patented claims now in issue were located. I made some surveys on the Buckskin Mountains, about twenty miles west of the Kane Springs, but whether it was for scrip or not I cannot tell. That was at Mr. Saunders' request, I think, in 1905.

Referring to Government's Exhibit No. 4, I think there were no scrip locations surveyed by me at Mr. Saunders' request anywhere within the area covered by this map. As near as I can remember I have testified concerning all the surveys that I made at Mr. Saunders' request for scrip locations north of the Grand Canyon in Arizona. I made a survey [153] for Mr. Saunders in the vicinity known as the Three Lakes, either in 1904 or 1905, but I don't recall what that survey was made for. I remember distinctly the Three Lakes, and I believe they were included within the boundaries of the survey. That survey was made at the direction of Mr. Saunders, the same as those other surveys.

(Deposition of John T. Breckon.)

I surveyed a tract known as Middle and South Lake for Mr. Saunders; that covered some water also. I cannot say what form of location he made on that. I went on the Buckskin Mountain from the Kane ranch when I was down there one trip. Mr. Saunders was there, he came up after we had finished the survey and met us and drove us toward Salt Lake. At that time I had three men and he had given me some location notices to make some preliminary surveys, but whether there was any scrip included in that I do not remember. I think my son was with me at the time of making the surveys of Three Lakes and South Lake. Mr. Dimmick was not there. Mr. Saunders came up just as we finished. We went through the mountains to Coconino instead of going back to House Rock Valley, just continued towards Salt Lake.

I do not know when the North Lake tract was surveyed. The form of location notices that were given me at the time I was directed to make the surveys by Mr. Saunders were lode locations.

I think that what is known as Three Lakes is a different and separate group of three pools or lakes from what is known as the Middle, South and North Lakes. I made three to six surveys about that time. It took three days. They were all separate as I remember, but they were all made at Mr. Saunders' direction and for him. The area included in each survey, if it was scrip work, was forty acres. Mining claims would be twenty acres. I don't remember surveying either the Soap Creek tract or the

(Deposition of John T. Breckon.)

Canaan Reservoir tract for Mr. Saunders. Two-mile tract and One-mile tract were surveyed by me for scrip locations. The tracts known as the Two-mile tract and One-mile tract are just a short distance from the Noonday lode, about a half a mile or a quarter of a mile, I should say, to One-mile tract, I don't remember about the Two-mile tract. There [154] is a House Rock tract that may have been called Two-mile tract, but it's not near the Canyon. The Two-mile canyon is one mile from One-mile canyon. My recollection is distinct that One-mile tract is about a quarter of a mile from the Noonday lode.

I surveyed the House Rock tract and the Jacobs Pools for Mr. Saunders. They were surveyed for scrip.

As a matter of fact all the locations that I testified to, both the patented claims now in issue and the ones which I cannot recall whether they were scrip or mineral holdings were in pretty much the same country as regards rock formation. These three patented tracts were more broken and had more rock on them than the scrip tracts. The scrip tracts were out in the open and valley lands. In every instance the scrip tracts had water within the boundaries of the survey.

I think I surveyed a mineral location for Mr. Saunders known as the Snipe lode. It was at the time I made the other surveys on top of the mountain. I think in February, 1904, or 1905, I recall making a survey for the Snipe lode and making a survey for the Crane lode at the same time; also the

(Deposition of John T. Breckon.)

Noonday lode, unpatented; also the Alaska lode and mill site; also the Frank lode, and also the Kane lode which I surveyed for patent. I believe these were all the preliminary surveys except the survey I made of the Kane, which was for patent.

Counsel for the Government here states that these surveys were made at the following dates: Snipe lode survey, February 17th, 1904; Crane lode, February 18th, 1904; Noonday lode, unpatented, February 18th, 1904; Frank lode, February 18th, 1904; Alaska lode and mill site, February 19, 1904.

WITNESS.—(Continuing:) I think all these lodes covered either springs or pools. These surveys were made at the direction of Mr. Saunders and *my and* two or three other men were there assisting me. I am not sure whether Mr. Dimmick was among them, I think he was. The men, other than my son, were employees of Mr. Saunders.
[155]

I don't remember any developments or improvements on the Snipe lode or Crane lode at the time I made the survey. I don't think there was any work on any of these lodes. When I say "any" I mean the Snipe, Crane, unpatented, the Noonday unpatented, the Frank and the Alaska lode and mill site. On the Kane lode I think there were two tunnels, I don't recall whether there was water in the tunnels themselves, but I think there was water in the tunnels and near the boundaries of the claim. There was also water on the other claims, namely: the Snipe, the Crane lode, the Noonday lode unpat-

(Deposition of John T. Breckon.)

ented, the Frank lode, Alaska lode and Alaska mill site.

When I surveyed the Kane lode for patent there was a pipe-line from the Kane lode to the Kane corral. That is shown on Government's Exhibit No. 3. When I say on the Kane lode, I mean every one of the tunnels on the Kane lode. On the other lodes just mentioned with the exception of the Kane lode there was no tunnel work or cuts or anything like that. I cannot recall which one that was. They all had water on them.

There was also a mill site in connection with my survey of the Kane lode; that mill site also had water on it, and had a short pipe-line that connected with the line that ran from Kane lode. The pipe that conducted the water to the Kane corral and there it was troughed for stock uses and for the house.

I remember surveying the tract upon which the Kane corral was located; that was taken up by scrip. It was a forty-acre tract, surveyed also at the direction of Mr. Saunders and in company with Mr. Dimmick.

I knew Mr. Saunders about ten or twelve years before I made the surveys and knew him up to the time of his death. During all that time his business was stock dealer in Utah, Arizona and Idaho. I met Mr. Ora Haley, one of the defendants, at Mr. Saunders' house once. I believe after the surveys were made. Mr. Haley just came into Mr. Saunders' office as I was going out and Mr. Saunders gave me an introduction to him. I had no conversation

(Deposition of John T. Breckon.)

with him about these claims. Just a short talk. I went on and he went on talking to Saunders. That was the only [156] that I ever saw him.

Mr. Saunders died four or five years ago.

Mr. Saunders introduced Mr. Haley to me as his partner. I remember then the checks Mr. Saunders had been giving me were signed Saunders & Haley.

On cross-examination by counsel for the Grand Canyon Cattle Company, the witness testified:

I am a mining engineer and surveyor. I knew Mr. Saunders ten or twelve years before I had business relations with him regarding these surveys to which I have testified. I cannot say that I was acquainted with his business standing. Only he had a good reputation. He was known as a man of integrity and probity in business affairs.

The country down there on the side and at the foot of the Buckskin Mountains and all that territory in the Buckskin Mountains is all sandstone. The Buckskin Mountains are mineral. The character of mineral is copper; not much of anything else. I made no report as to the mineral features of any of these claims; it was not my business to. I didn't get any instructions as to the survey from Mr. Dimmick. He went along and showed me the locations. I had no negotiations in the sense of instructions governing my employment there from Mr. Dimmick.

On redirect examination by counsel for the Government, the witness testified:

I never saw any mining of copper or any other mineral going on at any time upon the claims now in

(Deposition of John T. Breckon.)

issue—the Jacobs lode, the Sunset lode, the Noonday lode patented, and the Emmett lode. I had no personal knowledge of any ore ever having been shipped from the four lodes just mentioned. There might have been ore shipped without my knowing it. I never made any assays of ore or alleged ore taken from the four claims just mentioned. It was not my business to make such assays.

The WITNESS.—I wish now to state that when I was questioned regarding the open cut on the Jacobs lode I called the character of the [157] rock porphyry, I should have said sandstone, as I now remember that all the country rock is sandstone, and all reference as to the cost of working the rock on the Jacobs lode referred to sandstone.

Deposition of William Black, for the Government.

Counsel for the Government next offered and read in evidence the deposition of WILLIAM BLACK, who testified as follows:

My name is William Black; my residence is No. 34 I Street, Salt Lake City, Utah; I am the manager of R. H. Officer & Company, assayers and chemists. I have been connected with R. H. Officer & Company about fourteen years. About six months as furnace man and eight years as manager. During my employment there R. H. Officer was connected with the firm the first six years. Mr. Officer is now dead. He died, I think, in 1905. During the time of Mr. Officer's life and after my first employment there he was the proprietor of the R. H. Officer Company, I began to sign certificates of assay for the R. H.

(Deposition of William Black.)

Officer & Company in May of some certain year. I rather think Mr. Officer died in December, 1905, and that his brother had charge until May, and then after that I signed nearly every certificate. I will have to look that up, but say May, 1906. Prior to that time I hadn't regularly signed certificates of assay issued by R. H. Officer Company, nor had I signed them to any material extent. Prior to that they had been signed by F. H. Officer and R. H. Officer.

(Document offered as Plaintiff's Exhibit "A" shown the witness.)

That is my signature. That is the regular form of certificate of assay issued by R. H. Officer Company at that time. I cannot tell the exact date upon which I changed from this form to the form which we have had in use for several years, but that is the form of assay certificate that was had at one time and used by the R. H. Officer Company. R. H. Officer Company is not a corporation. They have been in business twenty-one years. I have access to their books and records. Since becoming manager of that company in May, 1905, I have been constantly in attendance upon the work of that company. [158]

I recollect a man by the name of B. F. Saunders. He brought me a sample of ore and asked that our company assay it, but I couldn't mention that specifically as to the time, and what sample. I have a record of the sample of ore brought to me for assay purporting to come from the Kane lode, Warm Springs mining district, Coconino County, Arizona. That ore sample as brought to me was assayed and

(Deposition of William Black.)
certificate of assay issued thereon.

Q. I will ask you then, Mr. Black, whether or not exhibit "A" is in its present form the certificate of assay which was issued? A. It is not.

WITNESS.—(Continuing:) I am able to state from my records what the original certificate showed as to the tungsten content of the ore submitted to me. That certificate originally issued showed no tungsten.

Our original records show that the date of the certificate of assay upon the sample given from the Kane lode, Warm Springs mining district, Coconino County, Arizona, was August 7th, 1906. Our records show whether or not an assay was made upon ore from this lode in this district on August 7th, 1904. That is the records in our office. There is no record of such an assay having been made on August 7th, 1904.

It is the practice of our office to keep a record of the assays as they are run, and certificates issued thereof. The signature "R. H. Officer, Assayers, W. A. B." is in my handwriting. Without looking it up, to the best of my ability it was not customary for me to sign certificates of assay as that is signed on August 7th, 1904. It was customary for me to sign them in 1906, and I signed substantially all the certificates of assay that were issued.

(Witness shown a paper marked exhibit "B.") That is a record copy of R. H. Officer & Company, and bears my signature. That record, exhibit "B,"

(Deposition of William Black.)

corresponds with the certificate of assay which I issued in the regular course of business. [159]

Counsel for the Government then offered and read in evidence Exhibits "A" and "B," attached to the deposition of William A. Black, as follows:

**Exhibit "A" to Deposition of William A. Black—
Certificate of Assay.**

R. H. OFFICER & CO.

Assayers and Chemists.

Name—Mr. B. F. Saunders.

Salt Lake City, Aug. 7, 1904.

Assay per ton of 2000 pounds.

Marks.	Gold.	Silver.	
Kane Lode Warm Springs,	oz.	oz.	Tungsten
Mng. District, Coconino,			
Ariz.	0.03	36.8	10.03

Sample contains copper.

Charges \$6.00.

R. H. OFFICER & CO., Assayers.

W. A. B." [160]

**Exhibit "B" to Deposition of William A. Black—
Certificate of Assay.**

R. H. OFFICER & CO.

169 S. W. Temple St. Salt Lake City, Utah,

Mr. B. F. Saunders, Aug. 7th, 1906.

Assays per ton of 2000 pounds. Tungsten

W03

Name.

Gold.

Silver.

oz.

oz.

Kane Lode Warm Springs

Mining District

Coconino, Arizona. 0.03 36.8 0.0

R. H. OFFICER & CO.

W. A. B.

Charges \$——. [161]

Deposition of A. F. Rynders, for the Government.

Counsel for the Government then offered and read in evidence the deposition of A. F. RYNDERS, who testified as follows:

My name is A. F. Rynders. I am thirty-one years of age; I reside in Salt Lake City, Utah, and my occupation is bank teller for Walker Brothers, Bankers. I am acquainted with Ora Haley, and I knew B. F. Saunders during his lifetime. Mr. Saunders died in July, 1910. Prior to July, 1910, I was employed by Mr. Saunders and Mr. Haley as bookkeeper and stenographer. The business of Messrs. Saunders & Haley was livestock, and they were copartners in that business. They were engaged in the business in this western country and had livestock interests in what is known as the

(Deposition of A. F. Rynders.)

Buckskin Mountains, in the State of Arizona. As bookkeeper and stenographer my duties were keeping most of the records of the livestock transactions. In that capacity I kept a record of the investments of the partnership, but not all transactions. I was employed by Saunders & Haley from December, 1901, until the partnership was dissolved after Mr. Saunder's death.

The books of accounts as kept by me showed the expenditures of the partnership on the Buckskin Mountains and other ranches maintained by the partnership. There were three different foremen in charge of the Buckskin Mountain ranch prior to the death of Mr. Saunders, during my employment with the company. They were John F. Neal, Ben Majors and Charles Dimmick; not all at one time, but successively. Charles Dimmick was in charge from 1904 until the property was sold, as near as I can remember. My recollection is that the date of the sale was in 1906. After the death of Mr. Saunders I was connected with the closing up of the partnership of Saunders & Haley, by submitting inventory to the attorneys for the executor of the estate of B. F. Saunders after the death of Mr. Saunders. Mr. Haley and myself had charge of the papers of the partnership. The papers of the partnership, after the closing up of the partnership—winding it up, were destroyed. I destroyed them [162] myself by burning. I burned those papers on the advice of the attorney for the estate, as he stated they had no further use for them, the partnership being closed. Mr. Haley also thought there would be no further

(Deposition of A. F. Rynders.)

use for them. The books and papers destroyed contained records of different transactions; also letters and letter files that had accumulated in the thirteen years of Saunders & Haley's partnership. I don't remember having anything to do with the transmission of the papers otherwise in connection with the application for the Kane lode.

(Witness shown exhibit "C.") I don't recollect ever having seen this letter, exhibit "C," before. The papers of the Saunders and Haley partnership were destroyed in the fall of 1913.

Q. Prior to the destruction of those papers, had you or had you not heard that suit had been brought by the Government involving the title to certain lands which had theretofore been acquired by the partnership and transferred to the Grand Canyon Cattle Company?

Mr. STEVENS.—Objected to as immaterial and incompetent.

Objection sustained, and counsel for the Government then and there excepted.

(A. I had heard indirectly from the newspapers. I had talked with Mr. Haley about that suit. but I don't remember it was prior to the destruction of the papers or after. I learned from the newspapers that this litigation had been commenced several months before the destruction of the papers.)

WITNESS.—(Continuing:) I am not able to state whether the original letter of which exhibit "C" is a copy was destroyed with the papers. If the original letter was among the files and papers of the Saunders and Haley partnership it was destroyed.

(Deposition of A. F. Rynders.)

The papers destroyed then contained all the records, letters and instruments in writing relating to the partnership of Ora Haley and B. F. Saunders, and I have now none of those papers in my possession relating to that partnership. [163]

Mr. SHERIDAN.—I now offer exhibit “C,” attached to the deposition of A. F. Rynders, in evidence.

Mr. STEVENS.—Objected to on the ground there is not sufficient foundation laid in proof of mailing and no proof that exhibit “A” was sent in response.

Mr. SHERIDAN.—We have a witness by whom we expect to connect up this matter.

The COURT.—We will proceed on the affirmation of counsel that it will be connected up.

**Exhibit “C” to Deposition of A. F. Rynders—Letter,
Dated December 3, 1906, from Lorraine Pratt
to B. F. Saunders.**

UNITED STATES DEPARTMENT OF AGRICULTURAL FOREST SERVICE.

Fredonia, Ariz., Dec. 3, 1906.

B. F. Saunders,
Salt Lake City, Utah.

Dear Sir:

I write to inform you that your claims, in Kane Canyon, were inspected, by the Forest Inspector, W. W. Clark & myself, during the forepart of November, and reported to the Department, as requested.

Forest officers, are now required to send a sample of 15 or 20, lbs. of ore to be tested, for the information of the Forester, and as there was no samples of

(Deposition of Charles Dimmick.)

ore to be found on the Claim, it is impossible to tell just what action will be taken by the Department.

I have mailed to the Forester, the Assay which you sent me, taken from the Kane lode.

Very respectfully,

LORRAINE PRATT,

Forest Supervisor.

Copy sent Supervisor.

“ “ D. L.” [164]

Deposition of Charles Dimmick (Resumed), for the Government.

Counsel for the Government then offered and read in evidence the remainder of the deposition of CHARLES DIMMICK, who further testified as follows:

About May or June, 1906, I learned that there was a deal on between Saunders and Haley and H. S. Stevenson. By that I mean that they were considering a sale by Saunders & Haley to Mr. Stevenson. I wouldn't have it understood that the sale was made then, but that it was being considered. It came to my attention in May or June, 1906, by a letter from B. F. Saunders. I have not that letter in my possession. It was burned up by me a few years ago. The only thing I recall that Mr. Saunders said in that letter is that he contemplated the sale of the whole property to Mr. Stevenson. I cannot recall what appeared to be Mr. Saunders' purpose for conveying that information to me by letter in May or June, 1906, I just recall that there was such a letter and that he conveyed the information. The next negotiations occurred on or about April or May,

(Deposition of Charles Dimmick.)

1907, when Mr. Stevenson and Mr. E. J. Marshall came to the V. T. or Buckskin properties to look them over.

I was there when they came and met them. Mr. Stevenson and Mr. Marshall told me they had come there to look over the property. They looked over the property and I accompanied them. There was E. L. Clark, Charles Lewis and a man whose name I have forgotten also in the party. Mr. E. L. Clark was with the party representing Saunders and Haley and showing them the property. Charles was helping the camp outfit, also the other man whose name I cannot recall. Mr. Stevenson and Mr. Marshall accompanied by E. L. Clark, Charles Lewis and a man whose name I cannot recall made the inspection together as a party. I don't think that on the occasion of this inspection we visited all of the water sources that I have described in my testimony. The watering places on the Buckskin Mountain ranch that I visited in company with Mr. Marshall, Mr. Stevenson, Mr. Clark and the rest of the party, as nearly as I can remember, were [165] House Rock, Two-mile, One-mile, Pools, Sunset, Emmett, Kane Springs, South Canyon, Jacobs lake, Greenland lake, Greenland Spring, Bright Angel, Milk Creek, Sublime lake or pond, Kanabonics, Big Spring, V. T. Park lake and V. T. spring, Little Park lake, Pleasant Valley lakes, Crane lake, Joe's Mudholes, Mile-and-a-half and Three Lakes, I believe that is all. The others mentioned in my testimony given heretofore were not visited by this party.

The person in the party whose name I cannot re-

(Deposition of Charles Dimmick.)

call to mind was not Murray Averett. This party whose name I cannot recall served as a driver and camp helper. He was a man from Oklahoma, whose name I have now entirely forgotten. I don't recollect a person by the name of David Barney. On the occasion of this visit it took, I think, five days for the party to visit all the places I have named. The party camped wherever night would overtake them and went on the next day. Mr. Stevenson and Mr. Marshall questioned me pretty carefully about the extent of the ranch and the water supply and the stock on the occasion of this visit—went into that at a great deal of detail. Mr. Stevenson and Mr. Marshall both did the talking. They stated to me that the purpose of their visit was to inspect the ranch and stock. I don't think they made a subsequent visit for the purpose of inspecting the other places which they didn't see on this occasion, before the sale was closed.

Mr. Stevenson and Mr. Marshall asked what places there were; how many stock they would support; the water, etc. They asked me about the name of the place in each instance, the amount of stock that could be watered there, and the amount of the stock that the ranch would accommodate. They asked me about the manner in which some of these different water sources were held. In that regard they asked about House Rock, Two-mile, One-mile, Pools, Sunset, Emmett, Kane Springs, South Canyon, Jacob lake, Greenland Springs, Greenland lake, Bright Angel, V. T. Park lakes, V. T.

(Deposition of Charles Dimmick.)

Park Springs, Little Park lake, Crane lake, Joe's Mudholes, Mile-and-a-half and Three lakes, and in each of the instances I have just named they asked either me or Mr. Clark about the manner in [166] which these places were claimed and I think that I or Mr. Clark informed them of the manner in which they were claimed. I didn't have with me at that time any papers or documents to which reference was made when they inquired about the details of the claims. I don't think Mr. Clark did. If he did it was not to my knowledge. There was no other person in the party who spoke for Saunders and Haley except myself and Mr. Clark. So far as I know all the representations that were made were made by Mr. Clark or myself to Mr. Marshall and Mr. Stevenson.

Mr. Clark came down there in company with Mr. Stevenson and Mr. Marshall, and accompanied them throughout this inspection and back to the railroad. They took the train at Lund, Utah.

Q. Now, did Mr. Marshall or Mr. Stevenson, or both of them, go fully into all matters concerning the range, cattle, water supply, and the manner of holding the lands where waters were, on the occasion of this five days' inspection?

Mr. TULLER.—Objected to as too general and indefinite and leading and suggestive.

Objection overruled, and defendant, Grand Canyon Cattle Company, excepted.

A. I think so.

WITNESS.—(Continuing:) After this inspection had been completed and before Mr. Marshall and

(Deposition of Charles Dimmick.)

Mr. Stevenson left the ranch and took the train at Lund they didn't say anything to me about retaining me in case of a purchase.

When I was appointed ranch foreman under Saunders and Haley about 1901, I was given the appointment by Saunders in writing. I have not that appointment in my possession, it was burned up about five years ago with the other papers. It was in the form of a letter from Mr. Saunders. As nearly as I can recall it provided that I should take general supervision of the Buckskin Mountain ranch. The appointment was to run by the month. It was employment to be paid by the month, but not [167] limited to one month. It was a general appointment, and compensation to be paid monthly. That was signed by Mr. Saunders and up to the time of the sale by Saunders and Haley to the Grand Canyon Cattle Company that appointment was in no way modified or changed or revoked by Saunders, but stood until the time of the sale. It was under that appointment that I carried on my work here on the Buckskin Mountain ranch and the range covered by the stock of Saunders and Haley from the time I received the appointment in 1901 to the time of the sale made to the Grand Canyon Cattle Company.

I recall that Jacobs lake and the Jacobs lode covering that lake and other adjoining land was inspected by Mr. Stevenson and Mr. Marshall and the rest of the party, on the occasion of this visit. With reference to this particular watering place, the Jacobs lake, I think it was Mr. Stevenson who ques-

(Deposition of Charles Dimmick.)

tioned me about the manner in which that was held. He inquired how it was held or secured, and I informed him as a mining claim, and gave him the name of it, the Jacobs lode. I think I called it Jacobs lake, possibly Jacobs lode. I told him it was held under a mining claim. I couldn't say I pointed out to him the shaft and cut on the claim or whether I just called him attention to the water supply when I made known to him the fact that it was held under a mineral claim. I don't think he made any inquiries about the mine or mineral on the claim.

On the occasion of this inspection the party didn't visit the Noonday lode mining claim to my recollection. They didn't visit the One-mile ranch and they made the same inquiries about that as they did about the Jacobs lode and I informed them of the manner in which it was held. I don't recall now whether that One-mile ranch had a mineral location on it.

The Noonday lode is on a Little Spring about a half mile east of One-mile ranch. The One-mile ranch is a forty-acre tract and was held under scrip. I don't remember whether the party visited the Noon Day lode which is about a half a mile from the One-mile ranch.

The inspecting party also visited the Jacobs Pool ranch which [168] I have also referred to as the Pools. It used to be called Jacobs Pools but since the name "Jacobs lake" came into existence they dropped the name of Jacobs pools and called it "The Pools."

The Sunset mill site does not cover a part of the

(Deposition of Charles Dimmick.)

Pools. The Sunset mill site is somewhere in the neighborhood of half a mile east or a little north of east of the Pools. So the inspecting party didn't go over to the Sunset mill site, but they went to the Pools, which was within one-half mile.

As to the Sunset lode and Emmet lode they went to the end of the pipe-line and tanks and reservoir, but didn't go up to either of these claims. They did look over the pipe-lines and the tank. When they inspected the Emmett lode they made the same inquiries as they did about the Jacobs lode as to the manner in which it was held, and I informed them it was held under the mineral location. The inspecting party didn't look at East lake nor Snipe lake nor at Frank's lake, but they did look at Crane lake, and inquired about the manner in which it was held, and informed them it was held under mineral location.

In these cases where they made an inspection of these claims they didn't look over the pipe-lines in all of them. They inquired about all the pipe-lines but didn't look them over. They inquired to ascertain what the pipe-lines were for, the amount of stock watered, etc., in a general way. They inspected the Crane lake and inquired as to the manner in which that was held and were informed by me it was held under a mineral location. They made practically the same inquiries at every place they visited, and got practically the same information in each one when they made any inquiries as to the manner in which the claims were held and the amount of stock. I gave them the same information

(Deposition of Charles Dimmick.)

in detail on all those places. I gave them the details as near as I could. I think I informed them of the existence of the other watering places which they did not visit. There might have been some overlooked, but I think every watering place; that was my intention in every instance, and I made my best efforts. [169]

Q. And informing them of these claims which they did not visit you told them of the development there and of the manner in which those claims were held?

A. Anything I knew about them, the claims.

Q. You gave them that full information?

A. Yes, sir.

Q. You gave that to Mr. Stevenson and Mr. Marshall on the occasion of his visit and inspection?

A. I can't say that I gave it to them both. I gave it to either one or the other.

Q. The information that you gave one was in the presence of the other, they were both interested in the matter?

Defendant objected on the ground that the question called for a conclusion of the witness, that it was incompetent, irrelevant and immaterial, which objection was overruled and exception taken.

A. Yes, sir, generally.

Q. And your knowledge as to these claims which the inspecting party did not visit is fully set out in the testimony which you have given as to the development of these claims?

A. So far as I know.

Q. And that was the information you gave to Mr. Stevenson and Mr. Marshall on that visit?

(Deposition of Charles Dimmick.)

Defendant objected on the ground that the question was too general, too vague and indefinite. Objection was overruled and exception taken.

A. Yes, sir.

Q. Did Mr. Stevenson or Mr. Marshall express any opinions as to what they thought about the Buckskin Mountain Ranch as a whole after the inspection had been completed?

A. Not in my presence.

Q. They just took it all in?

A. And went back home.

Q. And went back home? A. Yes, sir.

Q. I suppose, Mr. Dimmick, that you had all of the details of the claims visited and the claims not visited at the time of this inspection more distinctly in your mind than you have now?

A. I certainly did.

Q. And you gave them the information you had at that time, didn't you?

Defendant objected on the same grounds heretofore stated, as too vague, indefinite and general, and on the ground that in effect counsel and not the witness was testifying.

The COURT.—I cannot for the life of me determine just what that information was that is referred to here.

The objection was overruled and exception taken.

A. Yes, sir.

Mr. Stevenson and Mr. Marshall didn't talk to me about employing me to handle that ranch in case they should take it over. Mr. Marshall practically employed me after they had purchased the prop-

(Deposition of Charles Dimmick.)

erty. H. S. Stevenson also had to do with by employment by Mr. Marshall—both Mr. Marshall and Mr. Stevenson—about all Mr. Marshall said was that he would like to have me stay on the property and handle it for them for awhile at any rate. At that time I gave him the answer that I would see that it was handled and stay there myself until next spring. This conversation with Mr. Marshall I think was in August, 1907. I saw Mr. Marshall at the time he spoke to me about this at V. T. Park on the Buckskin Mountain. This was after the inspection that I have already testified about, August, 1907, I believe. It might have been the last of July, and the inspection was made in April or May, 1907.

[170]

Mr. Marshall was down there on the Buckskin Mountain ranch in July or August, 1907, with a couple of men from Los Angeles whose business I do not know. I learned their names but I have forgotten them. He didn't inform me what he was doing there at that time. I think he stayed on the occasion of that visit in July or August, about a week, and just stopped at the ranch headquarters where I was, in passing by. I think he stayed there two nights, coming and going, the rest of the time he stopped at Bright Angel. He stopped one night coming and one night going, to and from Bright Angel, and then went on to the train. Mr. Marshall didn't make any subsequent visits to the Buckskin Mountain ranch before I terminated my services with Saunders and Haley.

(Deposition of Charles Dimmick.)

At the time Mr. Marshall spoke to me about staying on and working under him he didn't say anything about the capacity in which I was to work for him, more or less, than the continued handling of the proposition in the same way I had been handling it for Saunders and Haley. He didn't specify any changes. He said to stay on in the same way I had been. That is the way I understood it. He didn't say anything to me about compensation.

I had some conversation with Mr. Stevenson about my employment afterwards, about the last of October, 1907, at the V. T. Park, Buckskin Mountain. This was subsequent to that inspection. Mr. Stevens was there in October, receiving the cattle, counting over the cattle that were to be purchased of Saunders and Haley, and that was being done at the V. T. Park ranch at that time.

Q. Now, what did Mr. Stevenson say to you about your employment?

Mr. STEVENS.—I object to that question on the ground that it does not show that Stevenson was an authorized representative of the Grand Canyon Cattle Company.

The COURT.—I overrule the objection, but I shall exclude it unless it is shown by the testimony that he had the authority to act for the Grand Canyon Cattle Company, and to employ Mr. Dimmick. [171]

Mr. STEVENS.—Note an exception. I suppose that this objection and exception might apply to all this testimony.

(Deposition of Charles Dimmick.)

The COURT.—Yes.

A. He wanted me to go on and take supervision of the entire works—Kane Beds included. Not only the Buckskin Mountain ranch but the Kane Beds ranch also.

WITNESS.—(Continuing:) At that time I agreed to do so. I received my last payment as ranch foreman for Saunders and Haley about the last of October, 1907. I received my first payment from either Mr. Marshall or Mr. Stevenson about the first of January, 1908. I received compensation for part of the month of November from the Grand Canyon Cattle Company. My employment with the Grand Canyon Cattle Company, after the termination of my services with Saunders and Haley, commenced, I think, on the 15th of November, 1907. I was paid by Saunders and Haley up to about ten days or two weeks before that time, and during that ten days or two weeks I was in Salt Lake City on my own time.

At the time of the termination of my services with Saunders and Haley I received a communication from B. F. Saunders personally advising me of the termination of my services. That was about the last part of October or the first of November, during the time I was in Salt Lake. I didn't return to the Buckskin Mountain ranch on the 15th of November, I think it was about the first of December that I got back there, but I was under appointment from about the 15th of November.

Q. Now, when you went back to the Buckskin

(Deposition of Charles Dimmick.)

Mountain ranch what authority did you have from the Grand Canyon Cattle Company as to the management of that ranch, and I include the Kane Beds ranch too?

Mr. TULLER.—We object to that on the ground it's a conclusion of the witness, and it's incompetent to prove the authority of an agent by the declaration of the agent.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

A. I was superintendent of the Buckskin Mountain ranch and the [172] Kane Beds ranch.

Q. And as superintendent you were authorized to purchase supplies?

Objected to as calling for a conclusion of the witness.

Objection sustained, and counsel for the Government then and there excepted.

A. Yes, sir.

Q. And you did do so?

Mr. TULLER.—The same objection.

Objection sustained, and counsel for the Government then and there excepted.

A. Yes, sir.

WITNESS.—(Continuing:) My work as general superintendent consisted in generally looking after the cattle in the ranch in pretty much the same way I did under Saunders and Haley, with the difference that I had the Kane Beds ranch added to my jurisdiction as well as the Buckskin Mountain ranch.

(Deposition of Charles Dimmick.)

As superintendent of these two ranches I had foremen under me on both ranches. I made my headquarters all over the property, practically my winter quarters were at Kane Springs and summer headquarters at the V. T. Park.

What I designate as the V. T. Park lake is right in the middle of the Buckskin Mountains, square on top. The V. T. Springs is right on the V. T. ranch there are three or four lakes on the V. T. Park.

Q. So your appointment under the Grand Canyon Cattle Company was for a limited period?

Mr. TULLER.—Objected to as calling for a conclusion of the witness and not a statement of the facts as to the appointment.

The COURT.—I admit it under the same qualifications that I admitted the other.

Mr. TULLER.—Exception; and that will cover all the rest of the questions on the same matter.

The COURT.—Yes. [173]

WITNESS.—(Continuing:) From the time of the beginning, including the year 1908, it ran from about November 15th, 1907, to and including the year 1908. I received a monthly compensation for my services.

Q. Now, about all the information that was in your possession, Mr. Dimmick, at the time of this inspection by Mr. Marshall and Mr. Stevenson concerning the entire affairs of the Buckskin Mountain ranch was made known by you to the best of your ability to Mr. Stevenson and Mr. Marshall on the occasion of that inspection, wasn't it?

(Deposition of Charles Dimmick.)

Mr. TULLER.—Objected to on the ground that it's incompetent, irrelevant and immaterial and because it calls for a conclusion of the witness and is so vague and indefinite as to be of no probative value and inadmissible.

The COURT.—I sustain the objection, and also on the ground that it has been previously answered.

Counsel for the Government then and there accepted.

A. Yes, sir.

WITNESS.—(Continuing:) I didn't give them information about the Kane Beds ranch, I left that to the other superintendent over there. I had nothing to do with the Kane Beds at that time. The transfer of the stock was begun about the first of October, 1907, and was completed about the last of October or the first days of November, 1907.

I may have met a Mr. Selden F. Harris, an officer in the Forest service, while I was on the Buckskin Mountain ranch; I cannot recall him. The chances are I did meet him if he was on the Buckskin Mountain.

I was not present at all the time the stock was being counted. I should judge I was there over half the time while it was being counted.

I believe David Barney to be a teamster for Mr. Marshall on the trip about July or August, 1907; I also want to give the names of a few more watering places that I have recalled that were on the Buckskin Mountain ranch in addition to the other given: Pond Canyon Lake, Milk Creek, Soap Creek, North

(Deposition of Charles Dimmick.)

Canyon, Wild Cat and three or four other lakes we never had any names for. The last additional watering places that I [174] have mentioned were not covered by any form of location or claim. All of the other watering places that I have mentioned heretofore in my testimony had some form of location or claim as testified by me. These last watering places that I have just given were not covered by any form of claim—were not developed in any way for stock use. They were just natural pools and springs; they were within the boundaries of the Buckskin Mountain ranch or range and were used by Saunders and Haley for stock.

On cross-examination by counsel for the Grand Canyon Cattle Company, the witness testified:

I first went to work for Saunders in 1894 and from that time to 1897 I was engaged in the handling of stock and ranching. From 1897 to 1901 I was doing all kinds of work with livestock—trailing, holding stock on summer ranges; general ranch work. After 1901 I was in charge of the Buckskin Mountain as ranch foreman, boss or superintendent. All these terms were used to designate my employment at different times. The general fact of my employment I remember, but after this lapse of years a great many details are indistinct.

There was a surveyor named Horn who came down there to that ranch to make some surveys. He was making a survey on Three Lakes tract, House Rock tract, Two-mile tract, One-mile tract and the Pools and maybe other surveys. He didn't make any sur-

(Deposition of Charles Dimmick.)

veys on the Jacobs lode, Emmett lode or Sunset lode and mill site, or Noonday lode, to my knowledge or recollection. I presume Mr. Horn was sent down by Mr. Saunders, but I am not positive.

My work for Saunders during the time I have mentioned was always in the capacity of ranch foreman or in the earlier part of my employment, general ranch work. I never did any work for him in connection with any other interests. He had sheep interests, but I don't know whether he had any interests aside from livestock; he might have had.

[175]

I know very little of mining operation. I know at times when a mine is opened that it frequently occurs that the operation of the mine is interrupted by the inrush of water. That is, the mining operations sometimes produce water as an instance without seeking for water and the water will run in by seepage or sometimes in an open spring.

I didn't locate any of the four claims—the Jacobs lode, Sunset, Noonday or Emmett. I am not prepared to say that no mineral was ever taken out of any of these four claims; I don't know. Some mineral might have been taken out without my knowing it.

The yearly reports that I made to Mr. Saunders were in the regular discharge of my duties as ranch foreman, and were concerning everything connected with the affairs I had anything to do with or what I did or had done; it was part of my business amongst other things to see that the stock on the range was

(Deposition of Charles Dimmick.)

provided with sufficient water; that was a part of my regular work, and it was my business to get water wherever I could and develop it the best way I could and take care of it without regard to the nature of the claim where I got it—within the boundaries of the range. It didn't make any difference to me whether it was a mining claim or any other sort of a claim or location, if I could get the water out of it. When I wanted water for cattle I got the water wherever I could, regardless of any conditions that might exist. I had no authority at any time to sell any of this property or to enter into negotiations for a sale, with the exception of the livestock, and I never did negotiate with anybody for the sale of any claims down there or other property, except livestock.

To the best of my recollection the first visit that Mr. Marshall and Mr. Stevenson made to the ranch was in April or May, 1907, it might have been in April, 1906, but it occurs to me that it was in the year 1907, and in the months of April or May; my recollection on that subject is not perfectly clear.

In April or May of some years the Buckskin Mountain country would be easy of access, and some years it would not. I don't remember the [176] weather conditions of April or May, 1907, but the weather was a little stormy in that vicinity on that visit. I know that because I got wet. There were practically both snow and rain storms. The condition of the roads and trails was fairly good, some mud on top of the mountain, but not impassable. I am referring to the condition of the roads and trails

(Deposition of Charles Dimmick.)

at the time of that visit, without specifying whether it was in April or May.

In going over the property at that time with Mr. Marshall I acted as guide and went with them in order to answer any inquiries they might make.

Q. You did not know anything about the capacity in which Mr. Stevenson was present there any further than that he was with Mr. Marshall?

A. Yes, sir, he was in the capacity of inspecting and looking over the property with the view of purchasing.

Counsel for Grand Canyon Cattle Company moved to strike out the answer on the ground that it is a conclusion of the witness and that the answer does not show that the witness spoke with any knowledge on the subject.

This motion was denied and the Grand Canyon Cattle Company excepted.

Q. Did he say to you that he was a purchaser or possible purchaser?

A. He told me that it was his business to look over the property and inspect it.

Said defendant moved to strike out the question on the same ground, which motion was denied and exception taken.

Q. Look over the property and inspect it?

A. Inspect with a view to purchasing.

The same motion, ruling and exception occurred on this question and answer.

Q. Did he say that he was intending purchasing?

A. I don't know whether he said directly or not,

(Deposition of Charles Dimmick.)

but at any rate I got the understanding from him and Mr. Marshall that they were there for the purpose of inspecting the property with a view of purchasing.

Statements of that sort were made to me by Mr. Stevenson. I have no recollection of Mr. Marshall saying anything or mentioning the purchase.

As regards the cattle sale or negotiations of the sale, aside from the mere inspection and information I had, was what I had received in a letter from Mr. Saunders. I specified certain watering places on the range as those visited on that trip and those I didn't specify, I didn't, to the best of my knowledge, visit. As they made inquiry I gave them the best information I had as I stated in my previous testimony.

Q. So that in giving information as to the patented mining claims which were part of the property you didn't go into details with regard to matters that would not be interesting or important aside from a view of the property as stockraising property?

Mr. SHERIDAN.—Objected to as calling for a conclusion of the witness.

Objection overruled, and counsel for the Government then and there excepted.

(No, sir.) [177]

Q. This inspection was as you had in mind, for the purpose of finding out whether the property was valuable and how valuable it was for the purpose of raising stock?

Counsel for the Government objected as calling

(Deposition of Charles Dimmick.)

for a statement of the witness as to what Mr. Marshall had in mind, which objection was sustained, and counsel for the Grand Canyon Cattle Company duly excepted.

A. Yes, sir.

Q. And you confined yourself in your explanation and answers to that conclusion?

Same objection, ruling and exception.

WITNESS.—(Continuing:) I didn't explain to them the character of the mineral nor how much mineral there was, or was not.

I had a conversation with Mr. Marshall about August, 1907, at the V. T. Park regarding employment, but I was not employed by Mr. Marshall at that time. The conversation, as near as I can recall it, was that Mr. Marshall at that time wanted me to accept the supervision or general ranch foreman of that property, and I stated to him that I would, or would see it was taken care of during the coming winter. As to the time of this conversation, by day or month, I am not clear. It might have been later than August, 1907. My employment with Mr. Marshall didn't commence until about November 15th, 1907, so that before that date I was not working for Marshall or for the Grand Canyon Cattle Company in any capacity. The first payment I received from Mr. Marshall was, I think, about January first, 1908; that payment was by check payable to myself, issued by myself on the First National Bank of Los Angeles. I don't know whether it would be termed a sight draft, it was directly on the bank. A Grand Canyon

(Deposition of Charles Dimmick.)

Cattle Company check on the bank, signed by myself.

In October, 1907, the purchaser or purchasers were engaged in counting the stock on the range, and that counting continued, to the best of my recollection, for thirty days, and ended about October 30th. Not all the stock were counted, because they were not gathered. They counted something like seven thousand head and there were about ten thousand head on the range. The remainder were not counted because the Grand Canyon Cattle Company and their representatives with Saunders and Haley, through an agreement entered into stopped or discontinued the counting of these cattle on the basis of ten thousand head. The reason why the remainder of several thousand head were not gathered or counted on the part of the Grand Canyon Cattle Company was that Saunders and Haley had one year in which to gather and deliver the entire herd of cattle, and therefore wished to stop the handling and jamming, and by so doing damaging this herd of cattle, and on the part of Saunders and [178] Haley to stop the big and heavy expense of continuing the gathering of the cattle. So they just arbitrarily agreed to quit making the estimate.

The weather down there at the time they were gathering and quit counting was very stormy, and the storm interfered and made the counting difficult.

David Barney, as I now place him, was a teamster with Mr. Marshall and Mr. Stevenson's party on the trip to the Buckskin Mountain about August, 1907. That was the trip after the inspection. It was the

(Deposition of Charles Dimmick.)

same trip that Mr. Marshall made to the V. T. Park that I referred to a while ago when I was talking employment with him. With reference to the property involved in this suit the Jacobs lode, Emmett lode, Sunset lode and mill site, I think, I stated that I knew that they were mineral claims. I would know by the location notices on them, but I didn't locate any of them.

On redirect examination by counsel for the Government, the witness testified:

I recall one of the teamsters who was along with Mr. Marshall and Mr. Stevenson and Mr. Clark on the occasion they came down and made their first visit and inspected the ranches with me. His name was Hiram Polie. There was another driver or helper with the party whose name I do not now recall. He was a young man about thirty, heavy set, light complected and inclined to be what you would term to be sandy—red faced. He was always called "Bill." Hiram Polie came from Cannonville, Utah. I wish to correct my former statement regarding Charlie Lewis, having him in mind in place of Hiram Polie at that time. So when I said that Charles Lewis was a member of the inspecting party I now wish to be understood that it was Hiram Polie instead of Lewis. The person whose name I don't recall was not David Barney. It is my recollection that David Barney was with Mr. Marshall on his August, 1907, trip. [179]

About seven thousand head of cattle had been counted and gathered when they stopped counting

(Deposition of Charles Dimmick.)

and a year was allowed in which to find out the entire number of stock, and the estimate agreed upon pending the complete count was ten thousand head. In arriving at this estimate Mr. Saunders and Mr. Marshall and Mr. Stevenson relied on their own judgment, but they didn't know the entire number of stock, and nobody to my knowledge suggested to them that there were ten thousand head. I would naturally assume that Saunders and Haley when taking their tallies and *get* their estimates, and I would naturally suppose that Mr. Marshall and Mr. Stevenson would rely on the information of Mr. Stevenson, he being there on the ranch and seeing the conditions and seeing how they were handled, and maybe asking questions of others. And if Mr. Marshall did ask me anything I don't think that would influence him. I was consulted as to my opinion as to the number of cattle, and I agreed with that estimate. That is my best recollection of the manner in which that estimate was arrived at, and when I say I assume that is the way, I mean my best recollection and best knowledge that I have about it.

In referring in my testimony to the time when the purchase was made by the Grand Canyon Cattle Company, I didn't use the word "purchase" as meaning the time of the actual execution of deeds transferring the property. I meant the time the bargain or sale was agreed upon between the parties. That was not agreed upon in my presence, but I knew that through Mr. Saunders and through these nego-

(Deposition of Charles Dimmick.)

tiations with Mr. Stevenson. When I refer to the purchase, the inspection by Mr. Marshall and Mr. Stevenson in my company was before the purchase. I don't think Mr. Marshall, Mr. Stevenson and myself at the time of the first inspection, visited the watering places that I last referred to. I cannot say positively that I informed them of these places, but I think so. My best recollection is that I gave them full information as I then possessed it concerning these watering places and the manner in which they were held and the developments thereon. [180]

Q. When you were showing the inspecting party, consisting of Mr. Stevenson, Mr. Marshall, yourself and Mr. Clark, and the drivers or helpers who accompanied these parties over these lands, you gave your very best efforts to inform them, Mr. Stevenson and Mr. Marshall, of everything concerning the ranch that you knew?

Counsel for the Grand Canyon Cattle Company objected to this question on the ground that it is too vague and indefinite, which objection was overruled and exception taken.

A. Yes, sir.

Q. And you didn't hold back anything?

Counsel for the Grand Canyon Cattle Company made the same objection, the Court made the same ruling and the same exception was taken.

A. No, sir. I had no instructions from Mr. Saunders to hold back anything. On the contrary, I had instructions to give them all the information they wanted, and all I knew.

(Deposition of Charles Dimmick.)

I was not authorized to enter into negotiations with anyone for the sale of this property or to assist in the negotiations more than showing them this property and describing it to them as I have stated. I was authorized to that extent and had instructions to do that very thing, and did do so.

With reference to the four patented claims, the Noonday lode, the Jacobs lode, Sunset lode and mill site and Emmett lode, I informed Mr. Stevenson and Mr. Marshall of the manner in which these claims were held. That is, as mineral claims, but I didn't go into the particulars of the improvements on those claims. The party visited the improvements on the Jacobs lode, but I cannot say positively whether I showed them the shaft and cut there. I think they went through the claim pretty fully. They didn't visit the other three patented claims, the Noon Day, Sunset and Emmet claims, but they were given full particulars by me concerning them of the development of water and piping and all that.

I couldn't say whether I pointed out the pipe-lines or not, but at any rate from the end of the pipe-lines or points where that was they were shown where these pipe-lines extended as coming from those other places. What I mean to say about the pipe-lines being explained would be to show Stevenson and Marshall where these claims and water places were located, and how they were held, and give them a general idea of the development and work or improvements that was on each and every one of them. And I did actually tell them when I come in contact with

(Deposition of Charles Dimmick.)

the pipe-lines from the Noonday, Sunset and Emmet claims that the pipe-lines did come from those claims.

[181]

I never saw, during the entire time that I was employed by Saunders and Haley, and up to the time that my services were terminated, any mineral mined on or shipped from any of the patented claims, namely: The Jacobs lode, the Sunset lode, the Emmett lode, and the Noonday lode.

When Mr. Horn came down to make some surveys in the Buckskin Mountain country or ranch, Mr. E. L. Clark of Parowan, Utah, was with him. I don't think anyone else came with him. Mr. Clark and Mr. Horn told me that they came to survey those tracts I have mentioned in my cross-examination and to which I also made reference in my direct examination. They also disclosed to me the purpose for which they were surveying them then and told me it was for the purpose of placing scrip on it. And all these surveys covered the waters described by me within those tracts. They also made known to me the fact that they came there at Mr. Saunders' direction for the purpose stated.

On the occasion of Mr. Saunders' visit to the Buckskin Mountain ranch, he used to chat with me freely in an informal and friendly way, and I was on good terms with him while I was in his employ. I have no recollection that he ever talked to me about his being in the mining business. I knew him as a cattle man and sheep man.

With reference to the one year period that had

(Deposition of Charles Dimmick.)

been agreed upon in which to complete the counting of the cattle, the cattle were never all counted, but so far as I know the transaction was closed on a basis of ten thousand head. The agreement that I referred to of a year's time in which to make this count was providing for the count being made before the purchase of the cattle was completed.

I was employed by the Grand Canyon Cattle Company about November 15th, 1907, and it was December first or thereabouts that I went back to the Buckskin Mountain ranch in charge of that and the Kane Beds ranch for the Grand Canyon Cattle Company.
[182]

**Deposition of Edgar L. Clark (Resumed), for the
Government.**

Counsel for the Government then read in evidence the remainder of the deposition of EDGAR L. CLARK, who further testified as follows:

I think the sale by Saunders and Haley of the Buckskin Mountain ranch to the Grand Canyon Cattle Company was in 1907. I took part, under Mr. Saunders' direction, or under the direction of Saunders and Haley, in the negotiations leading up to the sale of the Grand Canyon Cattle Company, and arranged for and did take Mr. Marshall and Mr. Stevenson, who represented the Grand Canyon Cattle Company, from Lund, a railroad station in Iron County, over to the Buckskin Mountain ranch and conducted them around on the ranch and back

(Deposition of Edgar L. Clark.)

as far as Toquerville, Washington County, and arranged for them to be taken back to the railroad.

Mr. STEVENS.—We move to strike out that part of the answer where the witness states “who Mr. Stevenson represented, the Grand Canyon Cattle Company, as a mere conclusion.

The COURT.—I admit that with the understanding that if it is not subsequently shown that Mr. Marshall or Mr. Stevenson represented the Grand Canyon Cattle Company in this purpose it would be excluded.

Counsel for the Grand Canyon Cattle Company then and there excepted.

WITNESS.—(Continuing:) The Mr. Marshall to whom I refer is E. J. Marshall, who, I understand, is president of the Grand Canyon Cattle Company. Mr. Stevenson’s initials are H. S., if I remember correctly. I met this gentleman at the suggestion of Mr. Saunders, who instructed me when I visited the ranch in company with Mr. Marshall and Mr. Stevenson to show them the ranch with a view of it being sold to them. This visit was made to the ranch in June, 1907, as I remember. In the party besides myself, Mr. Stevenson and Mr. Marshall, there were Mr. Charles Dimmick, who was foreman of the ranch, and I presume possibly one or two ranch hands would accompany us on a trip around the ranch. I have a [183] distinct recollection that Charles Dimmick was one of the party. I don’t recall the names of the ranch hands nor how many there were

(Deposition of Edgar L. Clark.)

that went with the party. I was working for Mr. Saunders at the time he instructed me to accompany Mr. Marshall and Mr. Stevenson on this inspection trip, and was not associated with him in any business transaction at that time. My relations with him were that of an employee at that time. I didn't know at that time what my compensation in that particular transaction would be. It was not determined in advance. It was later arranged that the amount of compensation I received was determined on the basis of a commission.

I accompanied Mr. Stevenson and Mr. Marshall over most of the range, but whether I visited the greater number of watering places that were to be found on the ranch at that time I am not able to say. I would think that perhaps at least half of the watering places were visited by myself in company with Mr. Marshall and Mr. Stevenson at that time. That is my best recollection at the present.

As I remember, Mr. Saunders gave me oral instructions in a conference with him in Salt Lake City. He didn't give me any papers or documents to take with me in pointing out these different places to Mr. Stevenson and Mr. Marshall. I don't recall on that occasion visiting, in company with Mr. Stevenson and Mr. Marshall, the mineral claims now in suit, namely: The Sunset lode, the Emmett lode, the Jacobs lode and the Noonday lode, except the Jacobs lode; that I didn't know the name of but I presume it was the one at Jacobs lake, and we did visit that. I don't remember now that I knew

(Deposition of Edgar L. Clark.)

anything about those mineral locations at the time spoken of.

From the time I was first employed by Mr. Saunders on the Buckskin Mountain matters down to the time of sale of the Grand Canyon Cattle Company, I don't know of any mining that Mr. Saunders or Saunders and Haley ever did on the Buckskin Mountain ranch and never knew of their shipping any ore from the Buckskin Mountain ranch. They were engaged in the livestock business on that ranch, principally the raising of cattle. [184]

I think Mr. Dimmick was along with the patry during the entire inspection, but I cannot remember that there was any special conversation between myself and Mr. Marshall and Mr. Dimmick during the inspection. We were talking about the range and about the game, and I now recall that Mr. Stevenson and I had a conversation about the fine condition of the ranch at one particular time while we were riding over a part of it. I think there was only one inspection of the ranch by this party accompanied by me. I don't remember that Mr. Saunders instructed me to lay the situation with reference to titles to all of those watering places on the Buckskin Mountain ranch before Mr. Stevenson and Mr. Marshall. My best recollection is that Mr. Saunders instructions were general, and that I should conduct Mr. Marshall and Mr. Stevenson over the ranch for the purpose of enabling them to to see for themselves. I don't think Mr. Saunders gave me any special instructions about laying the

(Deposition of Edgar L. Clark.)

matter of titles before Mr. Stevenson and Mr. Marshall. I don't remember whether I informed Mr. Stevenson and Mr. Marshall of the form of claim under which Mr. Saunders held any of the claims which I have purchased from other persons for Mr. Saunders. I would like to go further: That in describing to him a claim that we didn't visit that it was held under a scrip title and that it would be the claim of Soap Creek. It was an out of the way place and we didn't visit it, but I don't remember about the other claims that we didn't visit.

I do not remember of hearing any conversation between Charles Dimmick and Mr. Marshall and Mr. Stevenson concerning the manner in which Mr. Saunders held these various watering places.

I think I spent with Mr. Stevenson, Mr. Marshall and Mr. Dimmick, on this inspection tour, about six days on the ranch. That was the time we were actually on the ranch not including the time of coming and going. I don't recall whether I made a written report of this inspection to Mr. Saunders. [185]

Q. I will now call your attention, Mr. Clarke, to the record of the testimony already taken in this case, and particularly to a part of the testimony of James S. Emmett, and I will ask you to read over two pages of that testimony and tell us if you recall the conversation therein referred to Mr. Emmett between him and you?

A. Well, I do recall a conversation similar to that statement of Mr. Emmett's, but I cannot recall as to the time.

(Deposition of Edgar L. Clark.)

WITNESS.—(Continuing:) It seems to me that it was before I bought the spring that the conversation was had between Mr. Emmett and me in regard to not being able to get it sooner, but I didn't know he had a claim on it, as I remember, until we were there making these locations. At the time I had this conversation with Mr. Emmett, as I remember, I intended to locate this same watering place on which Mr. Emmett already had his claim until Emmett told me it was his, and forbid me to make the location on it. I intended to locate it, as I remember it, with scrip. I don't remember whether I subsequently located it for Mr. Saunders with scrip, nor do I remember whether I located it subsequently as a mining claim. In fact, I am not sure I assisted in the location of that mining claim. I do recall that I had a conversation with Mr. Emmett in substance as shown in his testimony.

I never knew of Mr. Haley of the partnership of Saunders and Haley, taking any active part in the management of the Buckskin Mountain ranch.

I was the executor of Mr. Saunders' estate, appointed without bond, and was a very near and dear friend of Mr. Saunders for a number of years past. Mr. Saunders didn't leave any part of his estate to me or my family. There is no relationship of consanguinity or affinity between me or Mr. Saunders' family. I don't know where the personal papers of Mr. Saunders are at this time. According to my best recollection I don't recall seeing the reports that Mr. Dimmick made yearly to Mr. Saunders. [186]

(Deposition of Edgar L. Clark.)

I now remember of a written document pertaining to the ranch claims being examined by Mr. Stevenson or Mr. Marshall or both, while we were at the Kane ranch, the winter headquarters, and as I remember it was furnished by the foreman Charles Dimmick. I remember only one document and I don't remember whether Mr. Dimmick, Mr. Stevenson or Mr. Marshall carried that document while they were looking over the claims.

There was a small amount of pipe laid at two or three watering places prior to 1900. I observed that there had been additional piping of water from the water sources, springs, or artificially developed water on the Buckskin Mountain ranch after 1900. Piping had begun after 1900, I observed, at House Rock proper; that is House Rock Spring, I refer to, an additional amount of piping to the extent of in the neighborhood of three or four miles carrying water from House Rock out into the valley further, and at the Pools the water was piped, and I don't remember whether it was piped later when I was there. I will say it was piped out from the hills into the valley perhaps a half mile, and at the East Pools it was piped out a mile or more, and at South Canyon it was piped out about five miles. All this piping I observed as having been put in after 1900, or put in by Saunders and Haley for the purpose of watering stock.

I was present when negotiations were had between Mr. Saunders, Mr. Stevenson and Mr. Marshall concerning the closing out of this purchase in Salt Lake

(Deposition of Edgar L. Clark.)

City. I recall the conversation that occurred between Mr. Saunders and the purchasers, Mr. Marshall and Mr. Stevenson. According to my understanding the original agreement was that Mr. Saunders should have a year in which to complete the gathering and delivery of the cattle and horses on the Buckskin Mountain ranch. Mr. Saunders was desirous of closing the deal up entirely at that particular time, and made an effort to do so by agreeing with Mr. Marshall and Mr. Stevenson as to the number they would allow him and accept the delivery as final. This number would [187] be in addition to the number that had already been delivered. They finally agreed upon the number. That was the substance of the conversation between Mr. Saunders and Mr. Marshall and Mr. Stevenson, as I recall it. I think that was somewhere in the fore part of December, 1907.

As I understand it there were written agreements between June, 1907, the time of the inspection, and the time of this conversation, but I don't know where those written agreements are; I may have read them over, but cannot remember for certain.

I don't think that Mr. Saunders after his agreement to sell to the Grand Canyon Cattle Company, or after the execution of the deeds completing the sale to the Grand Canyon Cattle Company, retained any interest in the Buckskin Mountain ranch for himself. I am very confident that he did not, and am very confident that Mr. Saunders didn't go into the Grand Canyon Cattle Company as one of its

(Deposition of Edgar L. Clark.)

members after the sale. I don't know whether the firm of Saunders and Haley retained any interest as a firm after the sale, but I fully believe they did not.

On certain occasions I was called on by Mr. Saunders to make inspections of the conditions of the ranch and the stock and to make reports to him. I think the number of such inspections were two or more. There was no fixed time on which I was to make inspection and report, but merely when Mr. Saunders asked me to do so. [188]

Deposition of David Barney, for the Government.

Counsel for the Government next offered and read in evidence the deposition of DAVID BARNEY, who testified as follows:

My name is David Barney, and I live at Kilgore, Idaho. I am sometimes addressed as Dick Barney. My occupation is ranching. In 1907 I lived at Marysvale, Utah. I am forty-five years of age and my occupation for the past fifteen years has been handling stock and ranching and raising hay. In the year 1907 I was down in the Kaibab country with some men from California,—Mr. Marshall and Mr. Stevenson. There was also a couple of men called Millbanks from Los Angeles. One was named Isaac and the other Nicoll, and they were in company with Marshall and Stevenson. There was also a cook in that party named Burt Yunkin. I first met these people at Marysvale. I was recommended by Saunders and Homer Thompson as a good man to take care of horses and the like of that, and to go

(Deposition of David Barney.)

with them down there. By Saunders, I mean B. F. Saunders, one of the defendants in this case. Homer Thompson lived at Marysvale and did a lot of Saunders' business in the line of loading pipe and salt for the Buckskin, and taking it from the train to the Buckskin Mountain country. I was employed with that party to take care of their horses and haul their cook and provisions. It was about two hundred miles from Marysvale to the Buckskin Mountain ranch, and took us to get down there something like ten or eleven days. We went right along until it come night and then camped, and the next morning we would go on, for about eight days, to reach the Buckskin Mountain ranch.

I never had any conversation with either Mr. Marshall or Mr. Stevenson wherein they disclosed their purpose in going down there.

After we arrived at the Buckskin Mountain country the first point we visited was Jacobs lake. I had a heavy white-top spring wagon; they had another one much heavier. Their outfit came from Salt Lake and they had it brought to Marysvale, and my wagon they met at Marysvale, that made the full camping outfit. They bought their horses at Marysvale and shipped down the rig they rode in from Salt Lake. When the party arrived at Jacobs lake we struck a man by the name of Charles Dimmick, [189] who was Saunders' foreman. They stayed there one night and Dimmick and Stevenson got on horses and rode up there near the Buckskin, over around the ranger's cabin—one of

(Deposition of David Barney.)

the Forest rangers. We stayed at his place one night and the next day went on to Bright Angel ranch. That is close to the brink of the Grand Canyon. We stayed there two days and then came back to the ranger's cabin again and then we went over west to what they called Kane springs. Then I left them there and they went to Lund on the railroad in southern Utah. Those are all the points visited by the party while I was with them. We passed several ranches, I have just mentioned the camping places. That was the only visit I made to the Buckskin Mountain ranch with this party and as nearly as I can recall I have enumerated all the places where the party stopped.

As near as I can recall it was close to the 25th or 26th of August, 1907, when I met this party at Marysvale and went with them to the Buckskin Mountain ranch. We spent five days on the Buckskin Mountain ranch, making these stops I have mentioned, after we arrived at Jacobs lake and before we started for Lund. I was with three of the party—the two Millbanks and Marshall, all of that five days. Stevenson and Dimmick left the party at one time. They rode horses and rode to the different places. Stevenson and Dimmick left the party at one time the way I stated, and Mr. Marshall and the Millbanks and the cook were with me all the time.

When we arrived at Jacobs lake the conversation was about cattle and about where they laid, and Stevenson went with Dimmick to look at them. I

(Deposition of David Barney.)

was asked to go wherever the Millbanks and Marshall went to look around. Their talk was about the cattle, how they intended to handle them. This was Marshall's talk to Millbanks. Of course he talked with Dimmick. They told him he could go right on, his job would stay as long as he wanted to stay and do the same work as for Saunders and Haley. Mr. Marshall said that; he said that just as long as he wanted to stay his wages would go on just the same. [190]

When we went to the Bright Angel ranch I think Dimmick had papers to describe all the other ranches, and of course the cattle, and he showed the papers to Mr. Marshall. I saw Dimmick show the papers to Mr. Marshall. These papers were to represent the claims, I think the different ranches and the like. So far as I gathered from the conversation between Dimmick and Marshall. The papers Dimmick had were the papers that showed title to the property. I saw these papers myself, but I cannot read. These papers were shown by Dimmick to Marshall at different points I have named that I visited with the party, and they went into the matter of the title to the claims there and consulted these papers, and that same procedure occurred when they also visited the Kane springs.

When we visited Jacobs lake, as far as I was able to observe, the place was used for stock-watering purposes and corrals. I didn't see any mining being done there. At the time the Bright Angel ranch was visited I saw just another stock place. There

(Deposition of David Barney.)

was water there, just dug out a little. That is a hard place for water. At Kane springs the water comes right out of a pool there out of a pipe there down to troughs where it is used for watering stock.

I don't remember the name of the Forest ranger whose place our party visited.

In the course of visiting the places I have named we passed something like a dozen watering places or pools that appeared to be devoted to stock watering places. This dozen or so other watering places were in the form of pools that had been worked a little; most of them there were corrals about them and salt troughs.

Q. Now, in the course of these visits to these different places you have mentioned, with this party, did you observe whether or not Mr. Marshall or Mr. Stevenson or the Millbanks, made any notes on the matters that were discussed?

Mr. STEVENS.—Object to that because it already appears from the witness that he couldn't read, and it calls for his conclusions as to what was being done in making notes. [191]

Mr. SHERIDAN.—We will show later that he does know how to read and write a little.

Objection sustained, and counsel for the Government then and there excepted.

(A. Yes, I think Millbanks took a note of every place, and Marshall too.)

WITNESS.—(Continuing:) There were photographs taken by Millbanks. I have some of them myself. If I had them I could show the pictures of

(Deposition of David Barney.)

the cattle and Jacobs lake and the corrals. I think one of the Millbanks sent these photographs to me from Los Angeles.

The party stopped at the Forest ranger's cabin one night going down to the Bright Angel and one night coming back.

Q. I now hand you a photograph, Mr. Barney, and ask you to state whether or not you recognize the person shown on that photograph?

(Photographs marked "Government's Exhibit No. 14," for Identification.)

A. That looks like the ranger.

WITNESS.—(Continuing:) The ranger's cabin was in about the center of the big flat. It is right to the southwest side of the flat towards the upper end. The flat is about five or six miles long, I should judge. It seems like there was one old man there at the cabin with the ranger, and I believe he was there on both occasions that the party stopped there. The ranger had a cabin made out of logs about 16x20. Saunders had a house there too, right by the cabin. There was no one living in the Saunders house when I was there. I saw the inside of it too, and there was a fire-place in one end and there were provisions there. I think it was kind of a headquarters camp.

I have assisted in hauling down shipments of pipe there and other things from Marysvale to the Buckskin Mountains. I have been there when they were loading it lots of times—six or seven years. Anybody they could get to take a load would haul it down

(Deposition of David Barney.)

there. There were tons of salt and a great deal of piping. [192]

I lived at Marysvale eight or nine years, and those shipments went on during that period from the town to Saunders' ranch. I was acquainted with the Saunders' men who attended to the hauling to the ranch, and I observed it being billed and weighed out by Saunders' men and billed to the Buckskin Mountain ranch. I had known Mr. Saunders about fifteen years at that time—1907. He sold a pile of cattle and shipped them. This Homer Thompson he kept there to weigh them out and receive the bulls, and I helped take care of the cattle and brand them. So in that way I became familiar with the shipping in of goods and taking out of cattle from the ranch. The first I learned of the deal having been made between Marshall and Stevenson and Saunders was the time I was with the party.

Q. Did you learn anything from the members of the party about whether or not Mr. Saunders retained any interest after the sale to Marshall and Stevenson?

Mr. STEVENSON.—We object to that as hearsay, and as an entirely improper way to prove a conversation.

The COURT.—I think that it too indefinite, I sustain the objection to it.

Mr. SHERIDAN.—Note an exception.

(A. Yes; I understood they left him an interest.)

WITNESS.—(Continuing:) I forgot what interest. Marshall told me. I cannot recall what inter-

(Deposition of David Barney.)

est Mr. Saunders retained after the sale to Marshall and Stevenson, but I did learn from Mr. Marshall that Mr. Saunders did retain an interest after the sale. The way I understood it they wanted him in and gave him an interest and let him hold on just because he was interested in the business or something. That information I obtained from Mr. Marshall himself while with the party.

(The testimony contained in the last paragraph was excluded by the Court under the same objection as to the last question given, and the Government, by its counsel, then and there excepted.)

WITNESS.—(Continuing:) I knew Mr. Saunders fifteen years prior to this visit of the party to the Buckskin Mountain ranch. He bought and sold cattle and sheep. Years ago he used to have sheep there. I think [193] in that way I worked for him. That is how I got acquainted with him first. He used to buy wethers and have them sheared. I never heard of Mr. Saunders being engaged in the mining business on the Buckskin Mountain ranch and never heard of him shipping any ore from that ranch, nor did I ever hear of any person under him shipping ore from the Buckskin Mountain ranch. So far as I know his business was that of sheep and cattle raising.

Mr. SHERIDAN.—We will offer the cross-examination and also the redirect examination of this witness.

(Deposition of David Barney.)

On cross-examination by counsel for the Grand Canyon Cattle Company, the witness testified:

I have lived in Kilgore two years. I left Marysvale three years ago. I was in Marysvale continuously until that time. I cannot recall the day that I went to the Buckskin Mountain ranch with Mr. Marshall and Mr. Stevenson. I think it was in August. There was in this party that I accompanied as a driver, Mr. Marshall, Mr. Stevenson, the two Millbanks, and a cook. The cook rode with me and the four rode to themselves. Mr. Marshall, Mr. Stevenson and the two Millbanks rode by themselves in a heavy spring Studebaker wagon.

I met them at Marysvale on the same day we started; I think between the 24th and 27th of August. We were gone on that trip from the time we left Marysvale until we got back, eighteen days. There were just these two wagons. The party spent two nights at the ranger's cabin. The party camped at night in the cabins anywhere there were cabins. None of the party stopped overnight at any of the ranch houses.

Dimmick was with us at Jacobs lake and stopped over night with us there. The party stayed over night at Jacobs lake the first night they got there.

Q. You spoke of some papers that Mr. Dimmick had with him and said that you understood they were title papers?

Mr. STEVENS.—Objected to as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

(Deposition of David Barney.)

Objection sustained, and counsel for the Government then and [194] there excepted.

(A. Yes.)

The witness then testified as follows: What made me think they were title papers was their talk and I knew they were to make a deal and Dimmick was representing Saunders in it.

To this testimony the Grand Canyon Cattle Company objected as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

Objection was sustained by the Court, and counsel for the Government then and there excepted.

WITNESS.—(Continuing:) I think they had both maps and sketches there; maps and also some descriptions of the various parts of the ranch.

Q. And you merely supposed that these were title papers? You saw them looking over some papers together?

Objected to as incompetent, irrelevant and immaterial.

Objection sustained, and counsel for the Government then and there excepted.

A. He would say this is such and such a claim, and then he would tell them what it was. He consulted the papers at that time.

WITNESS.—(Continuing:) I have not any positive knowledge that the papers that Dimmick had were title papers, only from their talk. I understood all along it was a trade and cattle deal and it was my impression they were down there on a matter of sale.

Q. And you inferred from that, and from the fact

(Deposition of David Barney.)

that Dimmick had some papers with him, that these papers were title papers?

Objected to on the same ground.

Objection sustained, and counsel for the Government excepted.

(A. Yes, sir.)

Q. And from the additional fact that they referred to them whenever they came to the different claims?

Same objection, ruling, and exception.

(A. Yes, that is correct.) [195]

Q. But in referring to them they did not say they were title papers? You did not hear them say they were title papers?

Same objection, ruling, and exception.

(A. Yes; I think I did.)

WITNESS.—(Continuing:) I think I have photographs of all the main ranches these people were to. I think also one of the next places they came to after they left me.

I never said that I didn't read. I said I didn't read much; I can read a little.

The work I referred to as having been done for Saunders was done on the hiring of me by some of his men at Marysvale, and that covered just odd jobs at different times. I never worked on the Buckskin Mountain ranch. I don't pretend to know all of Mr. Saunders' business interests.

On redirect examination by counsel for the Government, the witness testified:

In going down with that party, staying there and coming back, it consumed altogether eighteen days.

(Deposition of David Barney.)

It took eight days to go down there and I think about four days to come back from where I left them. We spent four days and part of another, I think, at the ranch. I didn't go all the way back to Marysvale with the party. I went to Kane springs and left the party there. When I said eighteen days, I mean to cover the time that we went from Marysvale to Jacobs Lake, the time spent in that vicinity and the time it took us to go back to Kane springs. The party didn't go to Marysvale. They took the train at Lund, and I am not including the time that the party took to go to Lund.

On that trip we camped out all the time until we came to Saunders' ranch at Jacobs lake and when we were inspecting the ranch and going to these different places sometimes we camped out and sometimes we camped in cabins. When I said in my cross-examination that we didn't stop at any of the ranch houses I didn't mean that we didn't stop in the cabins. I meant some of the cabins that were occupied by Mr. Saunders' men. [196]

Testimony of R. E. Geary, for the Government.

Mr. SHERIDAN.—We will now ask that Mr. Geary be sworn in the matter of connecting up those certificates of which we spoke in the Black and Rynders depositions.

R. E. GEARY, a witness on behalf of the Government, having been duly sworn, testified as follows:

I am forty-five years old; reside at Ogden, Utah, and am in the employ of the Forest Service of the United States. I have been in the Forest Service

(Testimony of R. E. Geary.)

four years the 16th day of next March. I am stationed at the present time at Ogden, Utah, and have been stationed there since March 16th, 1912. I am an assistant in the office of lands, and as such I have custody of the records of claims, special uses, water-power, range stations and status on some thirty-two forests, including the Kaibab and the Dixie.

(Witness' attention called to Government's Exhibit "A" attached to deposition of W. A. Black.) I have seen that paper before. I found this Exhibit "A" attached to a letter in the closed file relating to the Kane mill site and lode claims. I have the letter to which the notice was attached, and have other letters relating to it. One of these letters dated December 3, 1906, purporting to be signed by Loren Pratt, Forest Supervisor, was found in the closed files relating to the Kane lode and Kane mill site which are situated in the Kane Canyon in the Kaibab National Forest. The other letter was found in the files of the Forest Supervisor at Knab, Utah. That Supervisor had charge of the entire Kaibab National Forest. I have the custody of the records relating to claims on Kaibab National Forest.

(Examination by Mr. STEVENS.)

Only one of these papers were found by me, the one signed by Mr. Pratt. That was found in the closed files at Ogden, Utah, in the office [197] of lands, Forest Service, Department of Agriculture, and was found by me there. I had nothing to do with the finding of the other. I simply requested that an examination of the files be made by the Forest Super-

(Testimony of R. E. Geary.)

visor and that was one of the letters among others that he found.

(Examination Resumed by Mr. SHERIDAN.)

This letter dated December 3d, 1906, purporting to be signed by Mr. Loren Pratt and addressed to B. F. Saunders, Salt Lake City, Utah, was obtained from Mr. James M. Pelton, Supervisor of the Kaibab National Forest. As his superior officer I asked him to submit copies or originals of all letters which he had in his files relating to the Saunders claims or to any interest which Saunders may have had or the Grand Canyon Cattle Company may have had, and that was one of the letters.

Mr. SHERIDAN.—We now offer both these letters in evidence.

Mr. STEVENS.—I object to that on the ground that no sufficient foundation has been laid, and that they are incompetent, irrelevant and immaterial; they are hearsay and not public records.

The COURT.—With relation to this matter from the Forest Supervisor, is this a copy of the letter, or the original letter?

Mr. SHERIDAN.—I will ask Mr. Geary.

The WITNESS.—It is a carbon copy. It is customary to keep carbon copies of the official business sent out from the Forest service files, and this is from the Forest service files.

Mr. STEVENS.—The objection then is that being a copy it is not the best evidence.

Mr. SHERIDAN.—I will ask a few more questions.

(Testimony of R. E. Geary.)

WITNESS.—(Continuing:) At the time this letter purporting to be signed by Mr. Pratt was written, bearing date December 3d, 1906, there were no district offices as at present, organized in the Forest service organization. Supervisors like those on Kaibab plateau communicated with the Forester in Washington, D. C. [198]

The district offices were organized in 1908 and after that they communicated with the district forester in Ogden, Utah. The records which had been received in Washington prior to the organization of the districts were forwarded to the districts and kept on file. I have no positive knowledge that that particular letter was forwarded in that way, but I found it among the files that I understood had been forwarded from Washington. I have no absolute knowledge it was forwarded.

Only one of these letters came into my possession in the manner I have described. Mr. Pratt, the Forest Supervisor, I think is living at Fredonia, Arizona.

Mr. SHERIDAN.—We offer the letters at this time.

Mr. STEVENS.—Objected to on the ground that no sufficient foundation has been laid, and they are incompetent, irrelevant and immaterial. There is nothing to show that Mr. Saunders knew anything about them or ever received any such letters; they are hearsay and not public records.

The COURT.—I sustain the objection as to both letters.

(Testimony of R. E. Geary.)

Mr. SHERIDAN.—We think the letter from Mr. Pratt to the Forester at Washington, D. C., would be evidence to show that the certificate had been received from Saunders. It is an original.

The COURT.—I reserve my decision on that and will allow you to offer it at a later time; that will apply to both letters. [199]

Testimony of Selden F. Harris, for the Government.

SELDEN F. HARRIS, called as a witness on behalf of the Government, and being duly sworn, testified as follows:

I am thirty-five years of age, and reside at North Yakima, Washington. I was in the service of the United States as Forest ranger and promoted to the position of Forest Supervisor. I entered the Forest service as Forest ranger January first, 1906. In connection with the Dixie Forest, for the first four months of the year and then I was transferred to the Beaver, and afterwards transferred from the Beaver to the Grand Canyon National Forest, now known as the Kaibab National Forest. I assumed charge of the Kaibab National Forest January 25th, 1907. My duties were to oversee the grazing of cattle and their conduct; overseeing and conducting timber sales and cutting all timber in a general way. The grazing of cattle, building of roads, trails, developing under the direction of the Forest Service and officers where it was necessary to develop water for the maintenance of stock grazed upon the respective forests; making examinations and reports upon claims, particularly trespass claims, mineral claims, mill sites, and claims

(Testimony of Selden F. Harris.)

in a general way that may come in contact with the Forest or that are upon Forest lands. In the performing of these duties I traveled extensively over the Kaibab National Forest, then known as the Grand Canyon National Forest. There were range stations maintained there. There was one at the Potosky mine, one at V. T. Park, one at Bright Angel, one at Dry Park, and one at Jump-up. It was part of my duties to visit these stations and I did visit them during the summer months of that year at least once a month. I was there from January 25th until November first, 1907, and I think there were very few points of interest or importance on that forest that I didn't visit probably once and many of them several times. The nearest railroad to this forest is Marysvale, which runs north of the forest at a distance of one hundred fifty or one hundred seventy-five miles. The nearest railroad station is [200] Marysvale. On the south side there is a very limited access to the forest. There are two horse trails and a wagon road from the south. There are so few trails by reason of the presence of the Grand Canyon. The trails are called Bass's Trail, Bright Angel Trail and Lee's Ferry. The most western of these three trails is Bass's trail; on an air-line it would be about thirty miles from that to the Bright Angel and from there to Lee's Ferry about sixty miles on an air-line. Those are the only trails from the south. There are none from the east across the Canyon nor from the west that I know of.

I know a place known as Ryan on that forest. I

(Testimony of Selden F. Harris.)

know a place on the Kaibab National Forest known as V. T. Park. That is about thirty-five miles from Petosky, and about twelve miles from Bright Angel. Ryan was located on the forest a little south and west from Jacobs lake about eight miles. It was between twenty and twenty-five miles from Ryan to Dry Park and from Dry Park to Quaken about nine miles.

I have visited Jacobs lake while I was Forest Supervisor. I never saw any streams running in or out of it. I never saw any mining done there. I know of other claims owned by Mr. Saunders in that part of the country. There was the Kane lode and Kane mill site. I have visited them. On the Kane lode there were two or three tunnels driven into a sandstone dyke. I saw a pipe-line coming from the mouth of the tunnel leading to the Kane ranch. I followed that down to the end. They were piped into troughs or reservoirs. These troughs being located in cattle corrals, which were undoubtedly used for stock purposes. I saw the water running from those pipes into the troughs. I don't know positively any other location claimed by Mr. Saunders within the forest other than Jacobs lode and the one I have just described.

I met the Saunders people while I was on the Forest. I presume I met most all of the employees he had there. I recall Charles Dimmick, Charlie Crosby and Jim Owen. There were many others, in all about forty men. I was acquainted at that time with practically all of them.

I was quite intimately acquainted with Mr. Dim-

(Testimony of Selden F. Harris.)

mick. I think I saw him at least once a month during the ten months I was on the Forest. I had dealings with him on official matters relating to the [201] Forest. I would say that water was not abundant on that Forest. The character of the range in the Forest was very good.

While I was on the Forest as Forest Supervisor I kept a diary and have that diary with me. I recall that I was down on the Kaibab Forest in October, 1907, between the 18th of October and the 24th. At that time I was making what is termed by the Foresters a fall inspection of the range. That was a part of my official duties while I was there. I met quite a number of Saunders' men, all of my rangers and Mr. Stevenson with his party at the V. T. Park. One of my ranger stations was at the V. T. Park. I met Mr. Stevenson by a formal letter of introduction from Ranger Judd, one of my rangers. I recognize Mr. Stevenson now sitting in the courtroom. Mr. Stevenson was at the corral looking over the cattle in a general way and seeing that all the cattle were cropped. They were clipping off a part of the bush of the tail. They were doing that with the Bar Z cattle, which belonged to B. F. Saunders. I know that because the cattle were being grazed under permit by B. F. Saunders, and it was within my jurisdiction to ascertain that fact, and I had a record of that fact.

Mr. Tebho, another member of Mr. Stevenson's party, was also there. He had charge of the books

(Testimony of Selden F. Harris.)

and accounts of different pens of cattle which were being turned over to him, and he was making a record of it. I saw him do that. I was there in my official capacity to see that proper counts were being made and to deliver my personal instructions to my Ranger Judd. It was a part of my duties to attend to the grazing of cattle on that Forest and I was there in connection with my duties. I was checking Judd's count on the cattle and looking over the cattle to see if any stray brands were in that district, and getting a general line on the cattle that were there. I know only by Mr. Saunders' word how many cattle he had on there. I made a count of the cattle I saw there at that time. [202]

While I was engaged in the work of taking this count I had a conversation with Mr. Stevenson.

Q. What was that conversation?

Mr. STEVENS.—That is objected to as incompetent, irrelevant and immaterial, no sufficient foundation laid, and it's not shown that Mr. Stevenson was representing the Grand Canyon Cattle Company, the defendant in this suit, and his statements are not binding upon the defendant.

The COURT.—I sustain the objection as to any conversation between this witness and Mr. Stevenson.

Counsel for the Government excepted to the ruling of the Court, and asked that testimony be taken under Rule 46 of the Rules of Practice for the Courts of Equity of the United States.

Mr. SHERIDAN.—I would like to ask one prelim-

(Testimony of Selden F. Harris.)

inary question, your Honor, before taking the testimony under Rule 46.

The COURT.—You may frame the question to suit yourself.

Q. Mr. Harris, on the occasion of your meeting Mr. Stevenson at the V. T. Park ranch to which you have referred, did you have any conversation with him?

A. I did.

Q. Mr. Harris, do you remember the conversation you had with Mr. Stevenson? A. I do.

Q. Can you state of your own independent memory now what the conversation was?

A. The substance of it, yes, sir.

Q. State what that conversation was in substance, as nearly as you can recall.

Mr. STEVENS.—I object to that on the ground it's incompetent, irrelevant, immaterial, and no authority upon the part of Mr. Stevenson is shown to engage in any conversation with [203] this witness or anyone else so as to bind the Grand Canyon Cattle Company or any other defendant in this action. Moreover, no sufficient foundation is laid for the introduction of the conversation.

The COURT.—The objection is sustained, and the witness will now be permitted to answer the question under Equity Rule 46.

Mr. SHERIDAN.—Note an exception.

(A. During the conversation with Mr. Stevenson upon the branding chute in the corral at the V. T. Park I was frank to inform Mr. Stevenson that certain claims known as the Kane lode, Kane mill site and the Jacobs lode were being held by the Govern-

(Testimony of Selden F. Harris.)

ment as being invalid, and that it was very doubtful in my opinion if patent on the same would ever be issued because reports of all Forest Supervisors showed these claims to have been located to obtain water sources and not for mining purposes, and further than that that these claims were not upon mineral bearing rock in place. I think that was, as near as I can recall, the substance of the conversation at that time.)

Q. Did Mr. Stevenson make any comment after you so informed him?

Mr. STEVENS.—I make the same objection.

The COURT.—The objection is sustained, and the witness will be permitted to answer under Equity Rule 46.

Mr. SHERIDAN.—Please note an exception.

(A. There was no particular comment made, no, sir.)

Q. Did he do anything after you gave him this information?

Mr. STEVENS.—The objection is made upon the same ground, and also upon the ground the question is too indefinite and uncertain and almost inexplicable in its purport.

The COURT.—Objection sustained, and the witness will be permitted to answer under Equity Rule 46. [204]

Mr. SHERIDAN.—Note an exception.

(A. He proceeded along the regular routine of work that was being done with not very much to say. I think it was just about that time that some cattle were let out. Later we resumed our conversation

(Testimony of Selden F. Harris.)

in a more general way, and the conversation was soon changed, there having been a heavy storm coming up from the west, which made a very pretty picture, and he switched off on the conversation about the kodak. He said, "That would make a pretty picture, Harris," and I took a picture at that time.)

Q. You say you returned to your original conversation? Who returned to that original conversation first after you gave this information to Mr. Stevenson?

Mr. STEVENS.—I want the same objection to apply to all these questions.

The COURT.—It may be applied to all of it.

Mr. SHERIDAN.—And we preserve an exception. (A. I did.)

On cross-examination by Mr. STEVENS the witness testified:

At the time I have been speaking of when I went down to the corral I went on the 14th of October. I came from Ryan City, I believe. On the 18th I left Kanab for Ryan City; on the 19th Ryan City to V. T. Park, and when I saw Mr. Stevenson there at the corral, if I remember rightly it was when I got in that evening. It was probably after six o'clock—I don't know that I met Mr. Stevenson that night. I saw him the 20th, in the morning. I was there at the V. T. Park on the day of the 20th. I was there on the 20th and 21st, and left on the 22d. Then I went to Bright Angel and from there returned to the V. T. Park and left V. T. Park [205] for

(Testimony of Selden F. Harris.)

Ryan on the 23d. I went back to V. T. Park on the 22d. I was there the second time on the 22d and 23d. I got there along late in the evening of the 22d and left in the early morning of the 23d, some time in the forenoon. We broke camp on the morning of the 23d.

I don't know that I saw Mr. Stevenson on my return; the time I saw him on the 20th at the chutes is the only time that I know of seeing him. No, he was there on the 23d also, because he assisted us in building a cattle corral on the 23d. Those are the only two times I can recall that I saw him on this trip, the 20th and 21st. I don't recall that I saw him on the return trip; I will not say that I didn't but I have no recollection of it.

On the 23d I went to Ryan City and from Ryan City I went to Kanab—my headquarters were at Kanab, and I stayed there the remainder of my time at the Grand Canyon. The last time I saw Mr. Stevenson, my recollection is, October 21st, 1907, until I saw him here in the courtroom. I wouldn't say positively that I had ever seen him before I was introduced to him on the morning of the 20th. If my memory is correct I met him at V. T. Park. I saw this party once previous to that time, but I don't care to make a statement when. I saw him there the first or second trip they were there. I can recall seeing them, but the time I do not know. I was not introduced to him then, just saw him, and I didn't know who they were except somebody told me.

[206]

Testimony of R. E. Geary (Recalled), for the Government.

R. E. GEARY, recalled on behalf of the Government, testified as follows:

I have already testified that I am at present serving in the District Forestry office at Ogden, Utah.

(Counsel hands paper to witness.) That paper came from the official files in my office. If I may I would like to make a short explanation as to our method. The District office is divided into branches of grazing lands, operations, silviculture, etc.; and all correspondence referring to the different branches is filed in that particular office. And this letter you have handed me was found among the files of the office of grazing, in the office of the District Forestry at Ogden, Utah.

Mr. SHERIDAN.—We will now offer this letter in evidence as Government's Exhibit No. 28-P.

Mr. STEVENS.—We object to the letter on the ground it is immaterial and irrelevant.

THE COURT.—Well, I will admit the letter for the purpose of tending to show the agency, but unless further evidence is introduced I shall hold it is not sufficient. It may be admitted.

Mr. STEVENS.—Exception.

Letter admitted in evidence and marked Government's Exhibit 28-P.

Q. I now hand you another paper and ask you where it came from, if you know?

A. It came from the same source as the other, from the grazing files.

(Testimony of R. E. Geary.)

Mr. SHERIDAN.—We now offer this communication and its attached communication in evidence as Government's Exhibit 29-P.

Mr. STEVENS.—Objected to as immaterial and irrelevant and not tending to establish the agency of Mr. Stevenson.

Objection overruled, and counsel for the Grand Canyon Cattle Company then and there excepted.
[207]

Paper admitted in evidence as Government's Exhibit No. 29-P.

Mr. SHERIDAN.—We offer in evidence a notice of water location made by B. F. Saunders August first, 1901, covering the House Rock Tract, Two-mile tract and Jacobs pool, as Government's Exhibit No. 30-P.

Mr. STEVENSON.—Objected to as irrelevant and immaterial.

Objection overruled, and counsel for the Grand Canyon Cattle Company then and there excepted.

Notice of water location admitted in evidence and marked "Government's Exhibit No. 30-P."

Mr. SHERIDAN.—The next paper we offer is a deed bearing date February 24th, 1899, between A. L. Fotheringham and B. Gillies, parties of the first part, and T. S. Kingsberry, party of the second part, recorded at the request of B. F. Saunders August 1st, 1901, as Government's Exhibit No. 31-P.

Mr. STEVENS.—Objected to as irrelevant and immaterial.

The court.—For what purpose is the offer?

(Testimony of R. E. Geary.)

Mr. SHERIDAN.—To connect up the chain of title between Saunders and the Grand Canyon Cattle Company, and this, with other papers we will introduce will show that all these matters must have inevitably been brought to the attention of the Grand Canyon Cattle Company.

The COURT.—The objection is overruled on the affirmation of counsel that they expect to show that the title past to the defendant company.

Deed admitted in evidence and marked “Government’s Exhibit No. 31-P.”

Mr. SHERIDAN.—We now offer a deed dated August 5th, 1899 between Thomas S. Kingsberry, and Ora Haley, and B. F. Saunders, conveying certain interests to Saunders and Haley.

Same objection, ruling and exception.

Deed admitted in evidence and marked “Government’s Exhibit No. 32-P.”

Mr. SHERIDAN.—The next instrument is a deed dated December 17, 1900, [208] between Hyrum S. Shunway, and B. F. Saunders, conveying certain personal property in the part of lands that had been heretofore described to Saunders.

Mr. STEVENS.—Objected to as irrelevant and immaterial.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

Deed admitted in evidence and marked “Government’s Exhibit No. 33-P.”

Mr. SHERIDAN.—The next instrument is a deed dated December 2d, 1907, and executed December

(Testimony of R. E. Geary.)

5th, 1907, between B. F. Saunders and Ora Haley to the Grand Canyon Cattle Company conveying all the cattle branded Bar Z to the Grand Canyon Cattle Company.

Objected to as immaterial and irrelevant.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

Deed admitted in evidence and marked "Government's Exhibit No. 34-P."

Mr. SHERIDAN.—The next deed which we offer is dated December 2d, 1907, from Ora Haley and B. F. Saunders to the Grand Canyon Cattle Company, conveying personal property, pipe-lines, fences, corrals and other matters referred to in the testimony.

Objected to as irrelevant and immaterial.

Objection overruled and defendant, Grand Canyon Cattle Company, excepted.

Deed admitted in evidence and marked "Government's Exhibit No. 35-P."

Mr. SHERIDAN.—The next instrument is a deed dated December 2d, 1907, executed December 5th, 1907, between Saunders and Haley and the Grand Canyon Cattle Company, conveying the interests of Saunders and Haley in nine lieu selections or scrip locations referred to in the testimony. [209]

Objected to as immaterial and irrelevant.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

Deed admitted in evidence and marked "Government's Exhibit 36-P."

(Testimony of R. E. Geary.)

Mr. SHERIDAN.—The next instrument is a deed, dated December 2d, 1907, executed December 5th, 1907, between Saunders and Haley and Grand Canyon Cattle Company, conveying certain unpatented mining claims and water rights.

Objected to as immaterial and irrelevant.

Objection overruled, and defendant Grand Canyon Cattle Company, excepted.

Deed admitted in evidence and marked "Government's Exhibit No. 37-P."

Mr. SHERIDAN.—The next instrument is a deed dated December 2d, 1907, executed December 5th, 1907, between B. F. Saunders and the Grand Canyon Cattle Company, conveying the four patented mineral claims, the Emmett lode, Jacobs lode, and Sunset lode and mill site and the Noon Day lode.

Deed admitted in evidence and marked "Government's Exhibit No. 38-P."

Mr. SHERIDAN.—The next instrument is a mortgage dated December 2d, 1907, executed December 28th, 1907, between the Grand Canyon Cattle Company and B. F. Saunders.

Mortgage admitted in evidence and marked "Government's Exhibit No. 39-P."

Mr. SHERIDAN.—The next instrument is a release of the mortgage just introduced, signed by Ora Haley, and dated June 10th, 1909.

Release of mortgage admitted in evidence, marked "Government's Exhibit No. 40-P."

Mr. SHERIDAN.—The next instrument we offer in evidence is a certified copy of the decision of the

(Testimony of R. E. Geary.)

Commissioner of General [210] Land Office, cancelling the Crane Lode location, concerning which testimony has already been introduced.

Mr. STEVENS.—Objected to as irrelevant and incompetent; no sufficient foundation laid, and it is not shown that the Commissioner had any jurisdiction in the premises of the defendant or of the subject matter.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

Certified copy of the Decision of the Commissioner of the General Land Office admitted in evidence, and marked "Government's Exhibit No. 41-P."

The COURT.—Are there others of like character?

Mr. SHERIDAN.—The others are of like character.

Mr. STEVENS.—I suppose the the same objection and exception will apply to the rest of them?

The COURT.—Yes, and the same ruling. They are admitted, and the exception.

The Government next offered in evidence certified copy of the Decision of the Commissioner of the General Land Office cancelling the Frank lode.

Said certified copy admitted in evidence and marked "Government's Exhibit No. 42-P."

The Government next offered in evidence a certified copy of the Decision of the Commissioner of the General Land Office, cancelling the Noonday lode.

Said certified copy admitted in evidence and marked "Government's Exhibit No. 43-P."

The Government next offered in evidence a certi-

(Testimony of R. E. Geary.)

fied copy of the Decision of the Commissioner of the General Land Office cancelling the Snipe lode.

Said certified copy admitted in evidence and marked "Government's Exhibit No. 44-P." [211]

The Government next offered in evidence a certified copy of the Decision of the Commissioner of the General Land Office cancelling the Alaska mill site location.

Said certified copy received in evidence and marked "Government's Exhibit No. 45-P."

The Government next offered in evidence a certified copy of the Decision of the Commissioner of the General Land Office cancelling the Alaska lode.

Said certified copy received in evidence and marked "Government's Exhibit No. 46-P."

The COURT.—Let the record show that all these are admitted subject to the objections made to the first one.

Mr. SHERIDAN.—The next instrument we offer is a certified copy of the original record of the General Land Office relating to the following lieu selections already mentioned in the testimony: House Rock tract,, Two-mile tract, One-mile tract, Canaan Reservoir.

Objected to as immaterial and irrelevant.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

Certified copy of the records of the General Land Office admitted in evidence and marked "Government's Exhibit No. 47-P."

The next instrument is a certified copy of the origi-

(Testimony of R. E. Geary.)

nal records of the General Land Office relating to North Lake tract, Middle and South Lake tract, Jacobs Pools tract, and Soap Creek tract, being lieu selections already referred to in the testimony.

Same objection, ruling and exception.

Mr. TULLER.—I suppose it's generally understood that our objection to other claims applies to these as well as the other testimony.

The COURT.—Yes, it is so understood.

Mr. TULLER.—Note the exception.

Said certified copy of the records of the General Land Office admitted in evidence and marked "Government's Exhibit No. [212] 48-P."

Mr. SHERIDAN.—The next instrument we offer in evidence is certified copy of Articles of Incorporation of the Grand Canyon Cattle Company.

Articles of Incorporation admitted in evidence and marked "Government's Exhibit No. 49-P."

On inquiry from the Court as to the dates of the patent to the claims involved in this suit, it was stated by counsel that the Jacobs lode was patented March 17th, 1907; the Noonday lode January 22d, 1907; the Sunset lode June 9th, 1906; the Sunset mill site, June 9th, 1906, and the Emmett lode October 20th, 1906.

Testimony of Thomas F. Weedon, for the Government

THOMAS F. WEEDON, a witness on behalf of the Government, being first duly sworn, testified as follows:

My name is Thomas F. Weedon, and I am the Reg-

(Testimony of Thomas F. Weedon.)

istrar of the Land Office at Phoenix, Arizona; as such I have in my custody the records of the land office in that state. Among the records I have a letter from the Commissioner of the General Land Office, dated April 18th, 1910, signed by S. V. Proudfit, Assistant Commissioner of the General Land Office.

Mr. SHERIDAN.—We offer this letter in evidence

Objected to on the ground it is incompetent, irrelevant, immaterial and that there is no jurisdiction shown of the defendant or of the subject matter of Mr. Saunders.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

Letter received in evidence and marked "Government's Exhibit No. 50-P." [213]

**Exhibit No. 50-P—Letter, Dated April 18, 1910, to
Commissioner of General Land Office from S. V.
Proudfit.**

"DEPARTMENT OF THE INTERIOR, GEN-
ERAL LAND OFFICE, WASHINGTON, D. C.

April 8th, 1910.

UNITED STATES,

vs.

B. F. SAUNDERS,

Involving the Kane Lode and Kane Millsite, Mineral Entry #88, Survey 2119 A. & B. Affirming decision, cancelling entry and closing case.

Registrar & Receiver,
Phoenix, Arizona.

Sirs:

December 19th, 1905, B. F. Saunders made mineral entry #88 for the Kane Lode and Kane Millsite, Survey #2119 A. & B., situated on unsurveyed lands in Township 36 North, Range 3 east of the Gila and Salt River Base and Meridian, Warm Springs Mining District, Coconino County, Arizona, and within the Kaibab National Forest.

By office letter "P" of December 6th, 1907, you were directed to issue notice, under circular of November 25th, 1907, of charges preferred by a Forest Officer against the entry, the charges being:

1. That the land embraced in the lode claim is non-mineral in character.

2. That the development work has been done in such a manner that it plainly shows that they have been working to develop water and not mineral.

June 14, 1909, you transmitted registry return receipt showing service of notice of said charges December 18, 1907, and you reported that claimant had taken no action.

By office letter of August 24th, 1909, you were directed to render your decision on the record, and to notify the defendant thereof as provided by paragraph 12 of the circular of November 25th, 1907.

October 19th, 1909, you make report that on September 8, 1909, you rendered your joint decision

(Testimony of T. C. Hoyt.)

sustaining the charges and recommending that the entry be cancelled, of which the defendant was duly notified, [214] and has failed to appeal. Evidence of service consists of registry return receipt, dated December 9, 1909, and signed by J. M. Ross, attorney for the defendant.

Under Rule 46, Rules of Practice, said decision has become final as to the facts, and none of the reasons given in the said rule for disturbing the same appear. Said decision is accordingly affirmed, and said entry is hereby cancelled. So note your records and advise claimant.

Very respectfully,

S. V. PROUDFIT,

Assistant Commissioner.

BOARD OF LAW REVIEW,

By W. B. NEWMAN."

Testimony of T. C. Hoyt, for the Government.

T. C. HOYT, a witness on behalf of the Government, being first duly sworn, testified as follows:

My name is T. C. Hoyt; I am forty years old and I reside at Ogden, Utah. I am the Assistant District Forester in the United States Forest Service, Fourth District, with headquarters at Ogden. The Fourth District has within its jurisdiction the Kaibab National Forest.

I was born at Mt. Carmel, Kane County, Utah. That is about fifty miles from Jacobs Lake. I have visited the Buckskin Mountain country and the Buckskin Mountain ranch very frequently. My first trip to the Buckskin Mountain country was in the

(Testimony of T. C. Hoyt.)

year 1888. A foster brother of mine—a boy raised in our family, was the foreman at that time of the O. U. O. Company, and my first visit was with him, and I was on the mountain and in House Rock Valley about two weeks at that time. My next trip to the Buckskin Mountain was the following year. I don't recall that I was there in 1890 for sure. Very likely I was, because I went back and forth frequently with my brother. Three years after my first visit I began to ride occasionally in the summer-time when out of school, as a ranch hand [215] for the O. U. O. Company at first. Later for Mr. Lamb who owned cattle there, and later for the V. T. Company. The O. U. O. Company were in the cattle business. I was there practically every year from 1888 to 1905. Left in November, 1905, and was not there again until the summer of 1910. During the period from 1888 to 1905 I was riding the range and among other people I rode for the V. T. Company. They ranged their cattle all over the Buckskin Mountain country, generally in House Rock Valley and in the sand hills to the east. I became familiar with the watering places. Water was plentiful along the south end of the Kaibab plateau, but very scarce along the top of the plateau proper and along the north end of the east side, it was plentiful along the south. By plentiful, I mean there was plenty of water for stock. There were not more than one or two running streams on the south and quite close to the Grand Canyon, and what is known as the Basin, Milk Creek is one of them.

(Testimony of T. C. Hoyt.)

Ordinarily they may be within a half mile of each other, and at times when the water is high they become common. Ordinarily one could consider Milk Creek as being in the Basin, and Basin Creek proper also in the Basin. That is on what is known as the Buckskin Mountain ranch on the southern part of the ranch. It was within the ranch subsequently occupied by Saunders. On the west side of the mountain Big Springs run a little, about half a mile. Those were all the running streams that I know of except in the early spring there would be other water. At V. T. Park there were springs on the south end in the canyons leading into the Grand Canyon, but they were in the form of lakes, small ponds. I am familiar with the lakes on the Buckskin Mountain and vicinity. The largest one is probably one hundred fifty to two hundred yards across and very shallow. It was considered on the mountain a first-class summer range when not overgrazed.

House Rock Valley is considered, and according to my experience, is one of the best winter ranges that I know of.

While I was in that part of the country I became acquainted with Saunders' ranch foreman and hands. I knew Charles Dimmick after I was on the mountain as a cattle man. I first knew of his being on the mountain in 1904. I first recall meeting him personally at that time. He was then in charge for B. F. Saunders of the ranch. [216]

I became acquainted with the four patented

(Testimony of T. C. Hoyt.)

claims involved in this suit, namely: The Jacobs lode, Emmett lode, Sunset lode and Noonday lode. I first became acquainted with the land they covered, with the Jacobs lode and the Noonday lode in 1888. It was then called Jacobs lake, and subsequently covered by Jacobs lode in the official records. There was a direct road to the mountains passing Jacobs lode at that time. The direct road and most common road in that part of the country went directly from the town to the northwest to Jacobs lode. Any other road that came up came up what is known as Warm Springs Canyon, led past the lake within a short distance, and the lake was the general watering place when I first went down there between and Three Lakes, the next one directly on the road.

The distance from Fredonia to Jacobs lake is about twenty-five or thirty miles, and between Fredonia and the end of the railroad the nearest point on the railroad is about one hundred and thirty miles.

Bright Angel is the name applied to a creek that runs down what is known as the Bright Angel canyon on the south of the Buckskin plateau to the west of Greenland point. The term is also applied to a spring as being a spring in the head of Bright Angel canyon proper. It is near the Grand Canyon. The Bright Angel ranch headquarters is right on the edge of the Bright Angel canyon which is a part of the Grand Canyon, and it is a pretty good day's ride on horseback from Jacobs lake, I should judge about thirty miles.

The Kane ranch is on the east side of the Buck-

(Testimony of T. C. Hoyt.)

skin Mountain, situated at the mouth of the canyon, leading from Buckskin Mountain proper. It is about thirty miles from Jacobs lake, the ordinary way of travel, and there is a road connecting Jacobs lake and Kane. I know the names of other watering places than the Kane ranch and this Bright Angel spring. On the mountain there is Three Lakes, Frank's Lake, Mile-and-a-half Lake, East Lake, Snip Lake, Crane Lake, some little unnamed lakes east of Pleasant Valley, Ochre Lake, Dry Park Lake, several unnamed lakes in the V. T. Park proper; and then there is a spring on the extreme south known as Cliff Spring. [217]

Off the mountain there was Two-mile spring, One-mile spring, House Rock spring and the Pools spring. In my day, when I was working there, that included several springs.

I am familiar with the particular piece of ground covered by the four patented claims involved in this suit. I saw all but the Emmett and Sunset in 1904. That is, I saw the Noonday and the Jacobs and the Sunset mill site. On the Jacobs lode after it was I saw a mill there with all the adjuncts and a small house and storehouse and fences around the lake, and cattle corrals including branding chutes and brands, and some stables. I never saw anything representing mining, and never saw any mining being done. In 1904 I saw about the Jacobs lake a small cut just to the northwest of the lake a short distance. I never saw anything in the nature of a shaft. I saw wells around the lake. These wells

(Testimony of T. C. Hoyt.)

—it was the custom to dig just away from the margin of the lake a short distance where the waters could accumulate, and at times when it was badly stirred up in the lake the horses and work stock would water from these wells. I have seen as high as four of these wells there at a time. I never saw one in the center of the lake.

I saw four other wells around there than those I have described. They were simply excavations in the soil on the margin of the lake. Some of them were timbered and some, if they were not too deep, were not timbered at all. I refer to them as wells, the main reason was the condition of the water in the lakes not being fit to use because it was open to cattle, and cattle waded in it; moreover cattle were held in enclosures that surrounded the lake.

I also saw what appeared to be the top of a well cropping out and the windlass frame or the platform that was fitted up in the lake.

I have seen the Emmett lode and I recall what appeared to be a long trench cut in the bottom of the wash and timbered on the sides and on top and covered over, and at the extreme end next to the higher ground it went into the rock slightly and it contained in it iron-water piping. [218] There was a little stream of water running into this covered trench, and it went into a perforated pipe that stood vertical. That perforated pipe went into the ground, but in the wash below we could see the pipe-line leading down the draw below. I didn't follow that pipe-line all the way, but I know where the

(Testimony of T. C. Hoyt.)

water is utilized below, where it empties into the stock tanks. It was down in the bad lands below the pool on the road leading from House Rock Valley to Lee's Ferry. It was used for stock-watering purposes.

I have seen the Sunset lode and mill site; as I recall now a trench—that is, an excavation in the nature of a trench leading to a sort of tunnel that went into a hill. I didn't keep any figures of dimensions, but there was a tunnel there and water in this tunnel, and some perforated vertical pipe into which this water emptied. I didn't observe where the water was conducted, only that I saw exposed piping below the tunnel, piping which was just for piping water and leading down the draw or ravine. I followed that pipe down to where it apparently joined the pipe coming from the Emmett lode of which I have spoken.

I know of the Sunset mill site also. It is located probably a half a mile, perhaps a little over a half a mile from the Sunset lode over a sort of sandy, rocky bed. It is on the opposite side of the bench from the lode. The Sunset is down in a rocky gulch; that is, the tunnels are, and it is ledgy towards the northwest towards the Sunset mill site. Then you go towards a sandy bench and over it and down off this bench and come to this Sunset mill site in a similar canyon. At the Sunset mill site a trench had been run in the bottom of the ravine and into a sort of a timbered creek which was covered over at that time from which water was issuing. There was

(Testimony of T. C. Hoyt.)

no other development that I saw there at the Sunset. There was perforated pipe as in the other tunnels I have mentioned, a vertical piece of pipe perforated, into which the water was flowing. [219]

At the Sunset mill site below in the wash we discovered uncovered piping such as used for piping water, leading directly toward the tunnel about which I have spoken. That is, over to and towards the flats below. We followed it down as well as we could from surface indications. It went down to what we speak of as the Pool, and a little below the Pool on a sandy bed there where there was a reservoir and stock tank.

Referring to the character of the country lying between the Sunset lode and the Sunset mill site, there was a sandy hill in between them. There was no road over there. I remember it would be impossible to travel from the Sunset lode to this Sunset mill site with a wagon because of the ledges on either side of the canyon and because of the boulders and washed-out condition of the ravine below. When I say ledges I mean rock cliffs.

I saw the Noonday lode after it was located. The Noonday lode lies in the same canyon as what we speak of as the One-mile, being a little ways north of House Rock. The Noonday lode lies right in the head of this One-mile canyon, and covers the rocky ledges there. The improvements on that consisted of a couple of tunnels, one above the other. The upper tunnel was right in the wall of the red sand rock ledge, and then just below it the tunnel started

(Testimony of T. C. Hoyt.)

into the earth there and came into some red rocky formation as was shown in the upper tunnel. There would not be more than somewhere from ten to twelve, possibly twenty or thirty feet of tunneling there. The upper tunnel had the same perforated vertical pipe. I am not sure but I think in that instance the pipe was laying down on the solid rock. Just below the mouth of this tunnel we could see exposed pipe going down to the rocks leading in the direction of the lower tunnel. In the lower tunnel we could see the end of this same pipe and water was dripping into the lower tunnel from the upper tunnel from this pipe. The water then went into the perforated pipe going into the canyon proper, just a few rods below One-mile spring. It apparently from surface indications joined the pipe leading from One-mile spring. [220] The surface indications showed that it led down to the south and went down over the ledge. That pipe-line led directly to what is known as House Rock.

I have testified the Sunset mill site was over a ledge that was impassable by a wagon to the Sunset lode. The character of the ground in the opposite direction from the Sunset lode was rocky cliff, red sand rock cliff directly to the east, and to the south a red sand and rock canyon. I never saw it when it would be passable with a wagon.

I observed these conditions I have described on the Noonday lode in 1904 and 1905, and again in 1910. The other patented claims including the mill site I saw in 1905, but I am not sure of 1904. I was

(Testimony of T. C. Hoyt.)

well acquainted with them for years before 1904.

As far as the improvements at the Jacobs lake were concerned they were various at different times I was there. The first time I saw Jacobs Pool was about 1888. It was simply a lake and a fence around the lake and a cattle corral on the west of the lake and a little further away in the timber was what we called the sheep corral. There was a remnant of a cow pen only there at that time. There were wells on the margin of the lake when I first went there in 1888 and for all time when I was there. I have used the water out of these wells myself—the first time I was there, and practically every occasion I was there. That was how we got drinking water. I have seen them when they were pretty near only mud holes.

I recall having seen the ground covered by the Emmett lode prior to 1905. I knew the Emmett, the spring now covered by the Emmett lode, before it was developed at all, when it was simply a little seep there, and later when it was dug out and merely a little pool, and later when there was probably twenty or thirty feet of pipe and a board water trough there. The first time that I can recall that I observed what was the Emmett lode as a watering place was about 1890. It might have been before or during that year or the year after. I didn't see any actual development on the Emmett Spring until about 1900. At that time they just scraped out the bottom of the wash. I didn't notice any pipping at that time. I noticed [221] between

(Testimony of T. C. Hoyt.)

that time and the first of January, 1904, if I was there in 1904, the next time I saw it I saw it when there was only about thirty feet of pipe there. I saw this thirty feet of piping about 1900; it might have been 1901. I am certain it was before 1904. That pipe led about thirty feet to a watering trough.

I didn't know the Sunset lode to be developed as a watering place or actually used as a watering place at all. During my day it was up the gulch too far. That is when I was working on the ranch there. I didn't observe it actually as a watering place there until 1910. I knew of the seep up there and scooped it out with my hands and drank there myself, but never knew it as a stock watering place.

The conditions I have described about pipe in the Sunset lode I first saw in 1910. If I said 1905 I confused it with a later visit. With reference to the mill site the water was developed in 1910. Of course I knew of the seep before that. I couldn't fix the date when I first observed either the Sunset lode or Sunset mill site as seep, but it was during my service on the ranch in 1889 or 1890, and from that time on I knew it as a seep until I saw it developed in 1910.

I don't think I saw the Noonday as a watering place at all independent of One-mile. I didn't know there was water there covered by the Noonday lode until after that tunneling, and I first saw the tunnelling in the Noonday lode in 1904 or 1905. I am satisfied I was there in 1905, and I think in 1904. The improvements I have described were the only

(Testimony of T. C. Hoyt.)

improvements that I saw at those four places.

I didn't know Mr. Saunders to be in the cattle business on the Buckskin Mountain at all until about 1901, when I first heard of him. I didn't know him to be engaged in any other business besides the cattle business from 1901 until the time of the Grand Canyon Cattle Company. I never knew of the Saunders people doing any mining on the Buckskin Mountain. [222]

I know of six of the unpatented mineral claims claimed by Saunders. There was the Alaska lode, Alaska mill site, Noonday lode, Snipe lode, Frank lode and Crane lode. They are practically square on top of the plateau.

Mr. STEVENS.—I suppose it may be understood that the objection we have made applies to all of this?

The COURT.—Yes.

WITNESS.—(Continuing:) All of these unpatented mining claims had water in their boundaries in the form of small ponds. They were on the Forest Reserve. After I knew these unpatented mining claims as locations I saw no improvements there but corrals and cow pens and the lakes in most instances were fenced. Fences entirely around them. Prior to the time of the filing of locations on them they had the lakes fenced up, but they were not maintained during the time I worked on the ranch; they went into disuse. I never observed any mining done on any of these unpatented mineral locations. I know they were located in the name of

(Testimony of T. C. Hoyt.)

B. F. Saunders, but I don't know who placed the location notices on them.

With reference to the Coconino and Petosky mines, the Petosky property lies southeast of Jacobs lake and across what is known as Warm Springs canyon. I should judge it's in the neighborhood of a couple of miles from the Jacobs lake to the Petosky, and the Coconino property lies directly west of the Jacobs lake. The claims that I know of are between a half and three-quarters of a mile west of Jacobs lake. I cannot definitely remember when I first discovered any mining being done on either the Petosky or Coconino properties. The Petoskies were mining in there about 1895, not as the Petosky Company, but they were being mined by some one. The Coconino was a little later so far as I know. There were lots of prospecting going on there in 1896 and 1897. I was there then and I saw people carrying on prospecting there.

I have seen as high as twenty-five or thirty of these prospectors camping at the Jacobs lake. There was a little shallow lake on the Petosky property, and about a couple of miles southwest of Jacobs lake. The nearest of the claims was a half or three-quarters of a mile. I [223] have seen the miners whom I saw at Jacobs lake have in their possession copper rock at Jacobs lake. All I know was that the men down at their camp had copper ore in their boxes at the camp, and then I saw them carrying ore and at camp exhibiting the latest show-

(Testimony of T. C. Hoyt.)

ing from the work on their claims. They were working their claims to the west of Jacobs lake in what later became the Coconino property.

Testimony of B. L. Wheeler, for the Government.

B. L. WHEELER, a witness on behalf of the Government, being first duly sworn, testified as follows:

My name is B. L. Wheeler; my age is thirty-two years; mining engineer by profession, and my residence is Washington, D. C. My technical qualifications in mining engineering are that I am a graduate of the Columbia School of Mines of New York, from which university I hold the degree of Engineer of Mines. I have had about ten years' experience since graduation in general engineering work. My present position is mineral examiner for the Forest Service of the United States, in which work I have been for the last six and a half years.

I examined these four claims in question in company with mineral inspector W. L. Walker, and Assistant District Forester T. C. Hoyt, and part of the time in company with Forest Ranger Scott Brown. This was during the month of October, 1910. I was not with Mr. Walker on the 1908 visit. I didn't examine these four claims when they were examined prior to patent. I don't know that any one examined them for the Government prior to the patent. It was not the practice at that time.

Mr. Walker at that time held the position of Mineral Inspector of the General Land Office and I ac-

(Testimony of B. L. Wheeler.)

accompanied him on that entire inspection in 1910. We were together on the Buckskin Mountain for about two weeks or more. I took a number of photographs in the course of that examination.

(Counsel hands photograph to witness.) That was one of the photographs taken. That was taken by myself during the examination of the [224] unpatented Noonday claim covering what is known as East lake. The writing below the photograph I put in myself.

Mr. SHERIDAN.—We now offer this in evidence as Government's Exhibit No. 50-P.

Mr. STEVENS.—We have no objection, except a general one, and the objection that no testimony is proper as to the examination made in 1910.

Objection overruled, and counsel for the Grand Canyon Cattle Company excepted.

Mr. TULLER.—I understand that there are several of these photographs. May the same objection, ruling and exception be considered to all of them?

The COURT.—Yes.

Photograph received in evidence and marked "Government's Exhibit No. 50-P."

Counsel for the Government handed six additional photographs to the witness.

WITNESS.—(Continuing:) I also took these six photographs. The first one, Exhibit 51-P, is a picture of the Crane lode, covering Crane lake; the second, Exhibit 52-P, is of the Snipe lode, covering the Snipe lake; the third, 53-P, is of the patented Jacobs lode claim, covering Jacobs lake, and on that

(Testimony of B. L. Wheeler.)

photograph there are marked at the bottom the location of two of the workings. The next photograph, 54-P, is a picture of the cut on Jacobs lode at the alleged point of discovery; the next photograph, 55-P, is of the patented Emmett lode claim, showing the mouth of the so-called tunnel on that claim as returned in the field-notes of the patent survey, and the final photograph, 56-P, is a panorama showing the Noonday lode at one end, and the other, the adjacent One-mile lieu selection showing the character of the land. The notations in writing on the photographs are merely explanatory notes put in by myself.

The Government then offered the six photographs in evidence. [225]

Photographs admitted in evidence and marked "Government's Exhibits 51-P, 52-P, 53-P, 54-P, 55-P, 56-P," respectively.

WITNESS.—(Continuing:) When I made this examination in company with Mr. Walker in 1910, I spent parts of two days on the Jacobs lode claim with Mr. Walker and Mr. Hoyt, and went to all of the patented survey corners to see that the claims was definitely located. I examined all parts of the claim with regard to its mineral or nonmineral character, and particularly the cut at the alleged discovery point. The general formation of the claim is limestone or quartzite country rock, and at no point, did I find any mineral on that claim. Particular attention was given to the discovery cut, and the sides were dug into and minutely examined.

(Testimony of B. L. Wheeler.)

There is not the slightest indication of mineral in that cut. The other two improvements were found, —one is situated in the center of the pond and is shown in the picture. The other improvement, returned as a shaft in the survey notes, was found to be an excavation or well at the edge of the lake, mostly caved in. This was also examined, but no indications of mineral were found thereon. The lake was surrounded by a very excellent fence; there was a sawmill there on the claim and several buildings and a number of corrals and cattle chutes for branding and separating stock.

The next patented claim examined, which is off the forest, was the Noonday lode, in One-mile canyon. This claim was located by the patent survey notes and plat, and a tie was also run between it and the corner of the adjacent lieu selection. They are only about 1200 feet apart. The claim is situated near the head of One-mile canyon, and covers a very steep, horizontal, sandstone bed, locally known in that country as the Vermillion Cliffs. This formation extends over a great many miles of country. The two tunnels specified in the cuts were found, and very carefully measured and examined. Briefly, they were found to be in [226] sandstone country rock; the lower tunnel was found to be three feet wide, five feet high, and sixty-six feet long. Water was dripping in this tunnel from a pipe, which came through the roof and which was traced to the upper tunnel. Twenty-five feet from the first tunnel, there was found a perforated pipe from which the water

(Testimony of B. L. Wheeler.)

was drained off from the tunnel. The upper tunnel was found to contain a similar pipe running through the floor leading into the lower tunnel. This was traced down the canyon over the sandstone ledges and joins the piping from the spring on the Noonday lieu selection. The material in both those tunnels was identical, the red sandstone country rock. There was no indication of mineral whatever in either of these workings. The discovery point was found being merely a rock monument near the mouth of one of the tunnels,—one of the sandstone ledges. No indications of minerals existed there, and as far as can be determined, on the other claims.

The Sunset mill site, which was about fifteen miles from that claim was examined next, that is mentioning the patented claims; the other examinations were made in between. This claim lays about 1500 feet from the Jacobs Pools lieu selection tract. It lays on a rather rough ground, and covers the gulch bottom, in the bottom of which there is an excavation returned in the field-notes as a tunnel, but which is more of an open cut covered over, and sort of artificially made into a tunnel. This tunnel had two upright pipes in the bottom to collect the water and this pipe-line was found to lead down the gulch and join the pipe-line from the Jacobs lieu selection tract. It was partly filled with water. It was entirely in sand and the surface material from the wash. Inside the tunnel was another cut, either made naturally by the wash waters in the gulch, or else excavated by hand to carry off the wash waters. The surface

(Testimony of B. L. Wheeler.)

of this mill site was gone over, and Mr. Walker took a photograph during the examination. No improvements were made other than the two improvements mentioned, and there was no indication that the surface had ever been disturbed or used for mining or mill site purposes. [227]

The Sunset lode lies in the foothills of these same Vermillion Cliffs, the formation being of sandstone. It is about a half mile, mostly east, of the Sunset mill site, but over a rough sort of divide, or summit. The tunnel on the lode claim is at a lower elevation than the mill site. The United States location monument #3 on that claim was found and some of the patent corners. The tunnel on that claim returned in the survey is in the bottom of a gulch, and was examined as were the other workings. It is very badly caved in at the sixth set of timbers, and it was very difficult to get in through the tunnel. It was found to be about ninety feet long. The tunnel was in sandstone country rock its entire length, and showed no indications of mineral. There was no ledge at any point. It was all in red sandstone, and some gray sandstone interspersed in it. The formation is essentially the same on the lode claim as on the mill site, both red sandstone.

The general formation is the same, except that the mill site is mostly covered with wash, and the lode claim is in a steeper gulch wherein the rock is more exposed.

The mouth of the tunnel on the lode claim, as I recollect it, was a little bit blocked up, and there was

(Testimony of B. L. Wheeler.)

a pipe-line from that tunnel leading down the gulch in a southeast direction, not towards the mill site, but towards the foothills, the open valley. The location monument on that claim was found, or what was taken to be the location monument, it was found on the sandstone rock and was assumed to be the monument. There was no indication of any ledge or vein or any mineral at the point where this monument was found, or at any point on this claim.

The work on the Emmett claim is rather difficult to describe, but it can be best understood by the photograph which is already in evidence. It is a tunnel in a small valley, and there is only a foot or two of the tunnel now showing. It is essentially an open cut, which has been timbered over and made into a tunnel. The flat character of the ground where the excavation work was done is such as to preclude a tunnel. It goes to no depth whatever. The photograph above shows Mr. Walker at the [228] face of this excavation, and he was one hundred and fifteen feet away from the camera. In that distance there is a gain of only about twelve to fifteen feet in elevation, so that it could not be classed as a mining tunnel. The location monument was found, and in it the location notice, presumably the original one, showing that the claim was located by B. F. Saunders. I made a note, which I find in my notes: "The date was May 29th, 1905." I had copies of the location certificates with me, and that did not agree with the dates on the certificate, about a month's difference. In the tunnel on that claim,

(Testimony of B. L. Wheeler.)

there is a considerable amount of water dripping, and the pipe-line itself, out of that tunnel, leads down to the foothills or "bad lands." The remains of a watering trough were seen near the tunnel, and considerable loose piping lying around. There was also several surface cuts into the ground, one of which also had some piping emerging from it.

The tunnel, as can be seen from the picture, could not be examined inasmuch as it is too full of water, but on all parts of the claim, the examination was continued for mineral, and the formation is the same as on the other claims in House Rock Valley. That excepts the Jacobs lode of course. And no mineral was found at any point on that claim. I should mention that there was a second excavation just below the first one, apparently run under it, and had been abandoned, and the work started further up. That is the mouths of two tunnels are there, one below the other. I believe that is shown fairly well in the photograph.

This is the upper tunnel that I described. (Indicating on photograph.) One is just a few feet below the other. The lower tunnel is the first part of the excavation, and then it was continued farther up. They apparently dropped it. It is very difficult to describe these exactly as tunnels or cuts, because in the main tunnel, there is only about a foot or so of opening.

On this occasion I examined a number of lieu selections of which we had copies of the notices and descriptions, so as to tie them in and [229] find

(Testimony of B. L. Wheeler.)

their boundaries. The examination was made primarily to make a comparison to the mineral or non-mineral character of these claims and the patented and unpatented.

The only lieu selections examined on Buckskin Mountain was the North Lake and South Lake lieu selections, which covers the three small ponds locally known as Three Lakes. They are about a mile and a half from the Alaska lode, known as Mile-and-a-half lake. The formation is identical on the lieu selection with that on the Alaska lode, and we found on the other claims on the mountain that the formation is the same on Buckskin Mountain for miles and miles, all limestone or quartzite. There were the same ponds or depressions in that limestone on the lieu selections as there were on the mining claims.

The One-mile and House Rock lieu selection tracts, and they are within two miles of each other on the western edge of the Vermillion Cliffs, and the One-mile tract being in the same canyon and about 1200 feet from the Noonday lode, patented. The formation is exactly the same on all these tracts, the red sandstone which is typical of that country. The lands were run out and the tie was made to the Jacobs Pool spring, and it has the same general geology with reference to the Sunset lode, Sunset mill site and Emmett lode. There is no distinction between the character of the land from a geological standpoint. These claims, although they are about—that incorporation Emmett, Sunset, and Jacobs Pools, although they are about fifteen miles away,

(Testimony of B. L. Wheeler.)

are absolutely the same formation which is shown in the panorama picture of the Noonday lode.

The first claim is—the most southern one is the Crane lode, and from there to Jacobs lode is about eighteen or twenty miles north, that is the most northerly claim examined on the mountain or the Forest, and from there to the House Rock Group, it is about another eighteen or twenty miles, mostly easterly, down into House Rock Valley, and then from there it is about ten miles farther east to the Emmett, Sunset lode and mill site. So that it might be said to be roughly twenty-five or thirty miles north and south, and twenty-five miles east and west. The [230] claims in House Rock Valley are of entirely different elevation from the other claims spoken of on the mountain. The mountain is from seventy-five hundred to eight thousand feet elevation, and it is about two thousand feet lower in House Rock Valley.

The pipe-line from Two-mile tract down in the lower House Rock Valley is about four, five or six miles. It is the longest one I know of.

It was then stipulated by counsel that the testimony of the witness as to the condition observed on the ground, and his expert opinion, would be the same as that of Mr. Walker.

On cross-examination, the witness testified:

In respect to the Jacobs lode all that country on the mountain was the same geological formation and character—the same general geological formation and the same general type of country rock.

(Testimony of B. L. Wheeler.)

I examined a considerable amount of surface prospecting and mining work about a half a mile from the Jacobs lode. There are mineral deposits within a half a mile, but I don't think a person might strike a good claim there most anywhere. There might have been mines explored within a half a mile of Jacobs lode, as to whether they have turned out good or not I do not know. The condition at the Jacobs lode generally is not the same as it is at these places, or at these places where this mining had been done. The general formation is the same, but there is a distinct difference. The characteristic green stain and blue stain of copper is either shown there on the surface as croppings or in the workings. There are no such indications on the Jacobs lode. I would think that copper rock couldn't have been discovered on the Jacobs lode from the discovery cut. The other excavation is in the center of the pond, and of course I have never been in that excavation. There might have been copper taken out of that, but geologically there is a very slight possibility. The other excavation on the edge of the lake I state as my opinion that no copper came out of there. The excavation was examined and the dump. If there had been any copper there there would have been the characteristic green stain. I took some samples and had them assayed to verify my own personal opinion. I merely felt that it would be prudent and safer to [231] verify my opinion. I took them primarily for the purpose of having the evidence of assay for this case. I felt pretty confident what the

(Testimony of B. L. Wheeler.)

result would be. You can never be positive what an assay would show. I felt practically positive that there would not be any copper shown. But you never can tell when gold or silver will show. There was a possibility that gold or silver would show, but not a probability. I spent quite some time in examining the excavation, parts of two days, probably an hour one time and possibly a half hour or so next time—it's only thirty feet long.

The character of the examination was that the cut had been partly filled up with surface material. I made a very minute examination for the purpose of seeing whether there was mineral or not on the face and sides of the cut. There is no tunnel on Jacobs lode, it is an open cut, as shown in the picture. I think we examined practically both sides and the faces of the cut. We dug into the cut with a prospect pick and took samples along the sides and face of the cut, practically along the whole side. A good deal of soil formation is shown in the upper part.

Comparatively, we think we made a more minute examination of the Jacobs *lode* any of the other four or five patented claims, but the same character of examination was made on the others. We didn't take samples from each of the others because there was nothing to sample on the other claims. We didn't take any samples on any of the claims off the Forest Reserve. We examined the cuts carefully and the shafts, as much as they were, for the purpose of determining whether there were deposits of mineral, and also examined the general surface of

(Testimony of B. L. Wheeler.)

the claims as well. I always make it a practice to look at the dumps on claims and did so in this case. We examined them carefully where excavations could be carefully examined, as for instance on the Noonday lode. I paid more attention to the tunnels themselves, but I undoubtedly looked at the dumps also with considerable care.

Mr. SHERIDAN.—I have here the part of the diagram which was offered for identification before. I shall recall Mr. Wheeler for the purpose of seeing whether he put these markings on it, and if so when. This is the map that accompanied [232] the President's Proclamation of August, 1910.

It was marked Government's Exhibit No. 13 for identification.

The WITNESS.—I prepared that diagram and placed the markings that appear there other than those printed in the original proclamation, to be a part of my official report to illustrate their situation and their different character, and all the markings on that except the printed form were placed there by myself after I made that examination.

It was agreed between counsel that the note on the diagram, "approximate boundary of the area controlled for grazing through ownership of water" should be excluded.

The Government then offered the diagram in evidence.

Said diagram received in evidence, without objection, and marked "Government's Exhibit No. 13."

(Testimony of B. L. Wheeler.)

Mr. SHERIDAN.—I offer in evidence the President's Proclamation of August 23d, 1910.

Proclamation received in evidence and marked "Government's Exhibit No. 13-A."

**Testimony of T. C. Hoyt for the Government
(Recalled).**

T. C. HOYT, a witness on behalf of the Government, was recalled, and testified as follows:

I testified that on the south side of the Buckskin ranch there was water. Taking the top of the mountain Crane lake is the one of which I testified, and it would be some three to five miles from the pools and ponds I testified about, as I recall it now. I would say about five miles to the next permanent water south of the mountain. The lakes of which I spoke, namely, Three lakes, Franks lake, covered by the Alaska mill site, Mile-and-a-half lake, covered by the Alaska lode, East lake, covered by the Noonday lode unpatented; Crane lode, covering Crane lake; Franks lake covered by the Kane lode, and Snipe lake, all [233] lie to the south of Jacobs lake on the mountain. The next water south from the southernmost of these is approximately five miles. This water on the south side is between thirty and forty miles from Jacobs lake.

The claims named as covered by the locations, patented mining claims, and the lieu selections are the only permanent water, according to my knowledge and experience, in approximately somewhere from twenty to thirty townships of range. In that I in-

(Testimony of T. C. Hoyt.)

clude the waters covered by the unpatented mining locations as well as the patented. I am not sure I spoke of Soap Creek tract, the lieu selection lying to the east of House Rock Valley. I meant to include it and the Crane lode mill site. North from Jacobs lake it would be about fifteen miles in one direction to water and straight north; there is no water until you get to the Utah Line about thirty miles from Jacobs lake. The nearest water is fifteen miles from Jacobs lake in a general direction.

Mr. SHERIDAN.—The only other testimony we have to offer is the balance of Mr. Harris.

The COURT.—If counsel for the Government desires to present any further evidence on the admissibility of testimony of Harris I will hear it when the argument is presented, but for the present time I will adhere to my former ruling.

AND THEREUPON THE GOVERNMENT
RESTED ITS CASE. [234]

Testimony of E. J. Marshall, for Defendant.

AND THEREUPON, the defendant, Grand Canyon Cattle Company, called as a witness, E. J. MARSHALL, who being duly sworn, testified as follows:

I am fifty-four years old and reside in Los Angeles, California. I have lived there eleven years. I was born in Baltimore, Maryland; lived there three or four years and went from there to Illinois, and then to Texas, and lived there about seventeen years. I was engaged in Texas first in the railroad business and latterly in banking and ranching. I was in the

(Testimony of E. J. Marshall.)

railroad business first as a clerk in the transportation department of the Gulf, Colorado and Santa Fe Railroad Company, now a branch of the Atchison, Topeka and Santa Fe Railroad Company, and latterly Assistant Master of Transportation. I became assistant cashier of the bank at Lampasas, Texas, on June first, 1889, when I went out of the railroad work. I then went to California and engaged in the banking, ranching and farming. When I say "ranching" I mean feeding cattle, grazing cattle. I have never been engaged in the mining business and have never had anything to do with mining and have no acquaintance with a mining country.

I first went to the Buckskin Mountains in June, 1907. I went there from Lund, Utah, and I met there on that occasion Mr. E. L. Clark, whose deposition has been read here. I met him as the representative of Mr. Saunders, and I then proceeded to the Buckskin Mountains with Mr. Clark.

I came to the ranch, I believe, during the first week in June. I left Los Angeles on the 31st day of May and I was a day going to Lund and possibly three or four days going to Buckskin Mountain. My purpose in going there was to inspect what is commonly known as the V. T. ranch for the purpose of buying it. I had some negotiations with Mr. Saunders before that looking to a possible purchase of the ranch.

When we got to the ranch we found Mr. Dimmick, the superintendent of the ranch, shortly after we reached the ranch. When I say "reached the

(Testimony of E. J. Marshall.)

ranch'' I refer to that part known as the most northerly place, commonly known as Jacobs lake. I don't recall just what hour we reached there, but Mr. Dimmick came within an hour or two, I should think. After Mr. Dimmick [235] came we looked over the improvements of what is known as Jacobs lake during the afternoon and evening. That is all the places we visited that day. In looking over the improvements I didn't go into any tunnel or examine any shaft or examine the character of the ground and gave it no attention at all.

The next day we left before daylight or about daylight and dropped off the mountain to the east into what is known as House Rock Valley. Mr. Dimmick, Mr. Clark and my son went with me. First we visited three places in House Rock Valley commonly known as House Rock springs, One-mile springs and Two-mile springs. The purpose of visiting these places was to look at the character of the water supply. We then went down to what is known as House Rock, which is a rock house, and there had lunch and changed horses. Then we moved easterly ever following the road to Lee's Ferry, and inspected what is known as the Pools or Jacobs Pools, and the corrals to the south of Jacobs Pools. We next went from there to what is known as the winter headquarters—Kane Springs, and stayed there one night. The next day we moved south to what is known as South Canyon corrals and back to Kane Springs for the night. The next day we moved up on the mountains into Pleasant Valley and on to what is known

(Testimony of E. J. Marshall.)

as the summer headquarters, V. T. ranch, and stayed there one night. Then we moved southerly to Bright Angel camp. I am in doubt whether we stayed there that night or whether we came back to V. T. Park. However, if we stayed there that night we came back the next day. I think we lunched at Bright Angel camp and from that moved westerly to look at the condition of the range and see more cattle and back to the V. T. Park the same night. From V. T. Park we left there the following morning on our way out by way of Three lakes, and we went to Three lakes and from there we went out. We didn't come back to Jacobs lode.

I now know the location of the patented mining claims in controversy in this action. The only one of those claims we visited on this occasion was Jacobs lake. I didn't go to any of the others. The closest we went to any of the others I should say was from a half mile to a mile. The only paper I had on the Buckskin Mountain was a map furnished me by Mr. Clark. [236] (Counsel handed map to witness.) That is the map I just referred to. There were no title papers displayed to me, nor did I have any on that occasion other than this map I have just referred to.

Mr. STEVENS.—We offer this map in evidence.

Map admitted in evidence and marked Defendant's Exhibit "A."

WITNESS.—(Continuing:) I had discussions or conversations with Mr. Clark with reference to the title of these properties, but not with Mr. Dim-

(Testimony of E. J. Marshall.)

mick. Mr. Clark furnished us with this map with a view of showing us the land owned and controlled by Mr. Saunders that went to make up the plant of the V. T. ranch. Mr. Clark was not able to tell me off-hand which, in House Rock Valley or at the foot of the Vermillion Cliffs, was the patented land, or the land located by scrip, but he was able to say to me that all of the land from which water was taken was owned by Mr. Saunders either through patents from the United States or from land on which scrip had been located. Mr. Clark made those representations to me. I attempted to have a discussion with Mr. Dimmick in relation to the title of the property. On Mr. Dimmick's joining us after his arrival at Jacobs lake when Mr. Stevens and Mr. Clark and Mr. Dimmick and myself were in the neighborhood of the corrals at Jacobs lake, I asked him some questions with reference to whether or not the Jacobs lake was patented land or whether it was a scrip location. His answer was "Mr. Marshall, I cannot answer that question because I have not the authority. I recognize Mr. Clark as Mr. Saunders' representative and his messenger advising me of your coming just reached me to-day. I have no word from Mr. Saunders that you were coming to inspect this property. I don't know what your mission is here and I think you must pardon me for not answering any questions that have anything to do with pointed matters. I must first have the authority of Mr. Saunders, whom I represent as superintendent." He said that at Mr. Clark's request he

(Testimony of E. J. Marshall.)

would gladly show us over the property, the cattle, the range, etc. I asked him if he would tell us as to the number of cattle and he said "No." He said he didn't have the authority. I found Mr. Dimmick to be a very close-mouthed man. I would regard him as unusually so. My subsequent [237] experience with him—I don't know whether it was reticence or stubbornness—but it finally resulted in his being deprived of his position with me. I never saw him but once after that and had no conversation with him. I may have had an ordinary conversation with Mr. Dimmick on my next trip to the ranch, but none about titles.

Neither Mr. Dimmick nor Mr. Clark said anything to me with respect to the character of any mining locations, whether they were good or bad or whether any development had been done properly or otherwise, nor did anyone else in my hearing say anything about that.

I subsequently entered into a contract with Mr. Saunders for the purchase of these properties. (Counsel shows document to witness.) That is the contract signed by myself and Saunders and Haley. The handwriting fixing the date on the head of the instrument is my handwriting.

Counsel for the Grand Canyon Cattle Company then offered the contract in evidence.

Contract admitted in evidence, and marked Defendant's Exhibit "B."

WITNESS.—(Continuing:) I had met Mr. Saunders before taking up with him the matter of

(Testimony of E. J. Marshall.)

the purchase of these properties, before I began negotiations with him about this property. I was at Salt Lake City in the late winter of 1906 and 1907. I called on Mr. Saunders because the year previous I had bought from him two or three thousand head of steers for the feed land on my Chino property in Southern California, and as I had never met him I called on him. I indicated to him then that I was desirous of getting a breeding proposition in the Utah country, because I liked the grade of cattle. He spoke of what he regarded as a very fine property in Nevada belonging to a widow by the name of Cleveland. The Buckskin Mountain property was not mentioned. The only business I had prior to this with Mr. Saunders was that of buying this bunch of cattle from him in the fall of 1906, and I never had any social or friendly relations with him at any time. [238]

At the time this contract was signed, July 30th, 1907, I paid Mr. Saunders on the purchase price fifteen thousand dollars.

I subsequently made a trip to the Buckskin Mountains in early September, 1907. The occasion of my going was more a pleasure trip than anything else, and I took two guests with me. Mr. Isaac Millbank and his brother, Mr. Nicholas Millbank. It was more like a camping trip and we went early in September—the first week. I met Mr. Dimmick there. I met Mr. Barney in Marysvale. He was the driver of his own outfit and wagon, carrying the cook and the cook's supplies and bedding. I had no conver-

(Testimony of E. J. Marshall.)

sation with Mr. Barney at all with reference to this ranch. At that time our trip was confined to the ridge of Buckskin Mountain, and Mr. Dimmick went with me, but I had no conversation with Mr. Dimmick at that time with respect to the property. We reached Jacobs lake and spent the night. We were in a four-horse outfit, Mr. Stevens driving, and then I took charge of the four-horse outfit and Mr. Stevenson accompanied Mr. Dimmick on horseback. We drove over from Jacobs lake the following day to V. T. Park and spent the night there. The following day we went to Bright Angel camp and spent two nights. We then went back to V. T. Park and spent another night; then down the canyon to Ryan where we camped for the night. Then a day's drive to Kane Beds where we spent the night, and then we drove out to Lund and Barney and his outfit drove back to Marysvale. I didn't on that occasion visit any of these mining claims.

As a result of my two visits to this property I got no impression at all of these patented mining claims as to their mineral features. My examination of those lands was not with any reference to mineral. There was no statement made to me by anybody with respect to their mineral character or in respect to their development.

I am now president of the Grand Canyon Cattle Company, and became president on the 29th day of November, 1907. I succeeded Mr. Henry Stevens as president. Mr. Stevens was elected at the organ-

(Testimony of E. J. Marshall.)

ization of the company, and I believe the charter was dated October 4th, and the organization meeting was on October 30th, or thereabouts. By the organization I [239] mean the election of the directors and officers of the company. There had been no officers prior to that time and the company had done nothing.

(Counsel handed paper to witness.) That is a paper signed by me and delivered to the Grand Canyon Cattle Company at the date that it bears.

Counsel for the Grand Canyon Cattle Company then offered the document in evidence.

Document received in evidence and marked Defendant's Exhibit "C."

WITNESS.—(Continuing:) The contract referred to in that document is the contract of July 30th, 1907, made between myself and Saunders and Haley and is the contract that has been called to my attention.

The fifteen thousand dollars which was paid by me to Mr. Saunders was repaid to me by the Grand Canyon Cattle Company. After the execution of the contract mentioned I went to Salt Lake City with reference to this transaction, on the 2d, 3d or 4th of December, I don't remember exactly, but I think it was the 4th of December. The deeds which have been introduced in evidence I think were dated the 5th, as my time was very short and we worked until three o'clock in the morning of the 5th. Prior to the execution of these deeds and the payment of

(Testimony of E. J. Marshall.)

any more money I consulted an attorney in the matter—Mr. Critchlow, formerly of the firm of Pearce and Critchlow. At that time Mr. Pearce was Assistant Secretary of the Interior. I think Mr. Critchlow was practicing law, but I don't recall. I don't remember the name of his firm. I know I went to Mr. Critchlow.

There was furnished me for the use of the attorney whom I named an abstract of title.

(Counsel hands abstract to witness.) That is the abstract, and that was furnished to my attorney.

Counsel for the Grand Canyon Cattle Company then offered the abstract in evidence.

Abstract admitted in evidence and marked Defendant's Exhibit "D." [240]

WITNESS.—(Continuing:) I asked the attorney this question: "Is a patent from the United States Government on a mining claim to be regarded in the same way as a patent to a homestead or a desert claim, or are all United States patents on the same plane." His answer was "Yes." I was assured by my attorneys that I could purchase these patented claims safely. That was my advice from my attorney, Mr. Critchlow. After I received this communication from my attorney I then proceeded to have the transaction closed, and the deeds executed. I paid up there thirty thousand dollars in cash on behalf of the Grand Canyon Cattle Company and by them. It was in the heart of the panic. There were notes executed at that time other than

(Testimony of E. J. Marshall.)

the four promissory notes, aggregating one hundred and two thousand dollars, which were referred to in the mortgage introduced by the Government. The other notes were for \$65,150, and were executed by the Grand Canyon Cattle Company. They were in the usual form of negotiable promissory notes and ran for sixty days. There were six of those notes. I have not those notes now. I have made search for them but I don't know where they are. I assume that they were destroyed pursuant to the practice of destroying cancelled promissory notes. Those notes were paid by the Grand Canyon Cattle Company in the full amount, together with interest and exchange charges. One of them was paid a few days before maturity and the balance either at or a short time afterwards. All those notes were dated December 5th, payable sixty days after date.

The four notes secured by the mortgage which aggregated something like one hundred and two thousand dollars were fully paid with interest by the Grand Canyon Cattle Company before maturity.

(Counsel hands paper to witness.) That document appears to be signed by Saunders and Haley and the Grand Canyon Cattle Company by myself. It was signed by me and by Saunders on December 5th, 1907.

Counsel for the Grand Canyon Cattle Company then offered the document in evidence.

Document admitted in evidence and marked Defendant's Exhibit "E." [241]

(Testimony of E. J. Marshall.)

WITNESS. — (Continuing:) There was an agreement made between me and Saunders and Haley as to the number of cattle which should be considered as a basis of the purchase price. That agreement was made in Salt Lake City on December 5th, 1907. The agreement was not in writing beyond the contract of July 30th. The number of cattle that was agreed upon was ten thousand head. Those six promissory notes were executed as part of the purchase price.

I saw Mr. Dimmick in Salt Lake on that occasion. The last time I had seen him before that was in September on the Buckskin Mountain on the occasion of the second visit, and I hadn't seen him at any other time than those two occasions until I saw him in Salt Lake City. In September, on the occasion of my second visit, I asked Mr. Dimmick whether he would be willing to remain with me as superintendent of the ranch. His answer was that he thought he would, that he would at least until spring; that he hadn't been off the mountain for several years and he would like a little vacation before he took up his duties. That was all the conversation I had at that time. I had a conversation with him afterwards in Salt Lake City on the occasion of the execution of these papers. That conversation was on the 5th of December after all matters were closed and after the deeds were signed, and he was at that time engaged and his salary fixed and he was to depart that night or the next morning for the ranch. His duties were to be that of superintendent of the

(Testimony of E. J. Marshall.)

cow ranch, looking after the cattle and the water and the range conditions. He was to have no power to purchase anything or sell anything at that time other than supplies for the ranch. His salary began from December 1st, 1907. He probably didn't reach the ranch until about December 10th—until December 31st, 1910. He was not in my employ at the time his deposition was taken in this case. He had been discharged by me for insubordination. His employment began and his salary dated from the first of December, 1907. The statement of Mr. Dimmick in his testimony that he was paid from November 15th is not correct. [242]

Mr. Dimmick never had any authority from the Grand Canyon Cattle Company to draw any checks on any bank. He signed all pay checks which were drawn on the treasury of the Grand Canyon Cattle Company at Los Angeles. He had authority to sign checks of a similar nature to freighters in freighting in supplies. The custom was to advance them some money inasmuch as the freighting was two hundred miles. His checks were in the nature of an advance for freight charges, and then when the freighting was through a check for the balance was figured on a tonnage basis. There was no written contract or agreement with Mr. Dimmick as to what his authority was. It was all oral, or in the nature of letters. I have none of the letters with me, and assume that they are in the files of the Grand Canyon Cattle Company at Los Angeles.

Mr. Dimmick, while he was in my employ, never

(Testimony of E. J. Marshall.)

did anything for the Grand Canyon Cattle Company other than to look out for the cattle and the grazing and the water and make such improvements as he was authorized to make, after first being passed upon by the Board of Directors of the Grand Canyon Cattle Company. He was not authorized to make any improvements except those authorized by directors.

Mr. Saunders didn't retain any interest in this property that was sold to me, and he has never had any interest since.

Mr. Saunders died in the summer of 1909, sometime after the 4th of July.

There were no papers shown to me at the time I was in Salt Lake City, or any other time which showed the character of these titles other than this abstract. I have never seen the nonmineral affidavits, and never even knew of their existence.

I have had experience in the matter of buying cattle ranges and property of that kind. I bought the Chino ranch, the Jesus Maria ranch in Santa Barbara County, California, in 1904, consisting of 42,000 acres. That was a Mexican ranch. I bought the Chino ranch in 1905, consisting of 48,000 acres. The third property I bought in the way of a ranch is the Grand Canyon Cattle Company ranch, or what is known as the V. T. ranch. [243] I bought the Palomas of Wood-Haggenbarth Company, Ltd., of Salt Lake City, of two million acres, lying in north-erly Chihuahua, the north boundary of which is the north boundary line for one hundred sixty miles

(Testimony of E. J. Marshall.)

west of El Paso, in 1909. I bought the Santa Rosa ranch, of Santa Barbara County, of forty-five hundred acres, in 1913. I believe the price which I paid for the properties conveyed to me by Saunders and Haley was a fair price.

The first I heard of any claim made by anybody, Government, or anyone else, as to anything fraudulent, wrong or irregular in the location of any of these claims was when this suit was brought. I don't think I had any knowledge whatever as to any question being raised by anyone with respect to the validity of these claims until this suit was filed. I feel quite sure that I heard nothing concerning such frauds until this suit was brought. I knew nothing about whether the ground embraced in any of these patented claims was mineral ground when I made this inspection, nor have I since learned. 50.

